
Alaska's Plea Bargaining Ban Re-evaluated

January 1991

alaska judicial council



alaska judicial council

1029 W. Third Avenue, Suite 201, Anchorage, Alaska 99501 (907) 279-2526 FAX (907) 276-5046

EXECUTIVE DIRECTOR
William T. Cotton

NON-ATTORNEY MEMBERS
Hilbert J. Henrickson, M.D.
Leona Okakok
Janis G. Roller

ATTORNEY MEMBERS
Mark E. Ashburn
Daniel L. Callahan
William T. Council

CHAIRMAN, EX OFFICIO
Jay A. Rabinowitz
Chief Justice
Supreme Court

ALASKA'S PLEA BARGAINING BAN RE-EVALUATED

Teresa White Carns
Project Director
Alaska Judicial Council

Dr. John Kruse
Research Consultant
Institute for Social and Economic Research
University of Alaska Anchorage

January 1991

Plea Bargaining/Presumptive Sentencing Staff

William T. Cotton, Executive Director
Teresa W. Carns, Project Director
Susanne Di Pietro, Staff Attorney
Josefa M. Zywna, Administrative Assistant
Peggy Skeers, Executive Secretary

Dr. John Kruse, Research Consultant
University of Alaska Anchorage, ISER

Past Staff Members:
Harold M. Brown, former Executive Director
Gwen Byington Prewitt, Project Interviewer

DISCLAIMER

This document was developed under grant number SJI-87-08X-A-058 from the State Justice Institute. Points of view expressed herein are those of the authors and do not necessarily represent the official position or policies of the State Justice Institute.

ACKNOWLEDGMENTS

We thank the State Justice Institute for funding this work and for being extremely supportive and helpful throughout. Our special thanks to members of our Advisory Committee: Floyd Feeney of University of California at Davis Law School, William McDonald of Georgetown University, and Frank Zimring of Boalt Hall School of Law at University of California; and Dana Fabe and John Salemi (Public Defenders), Larry Weeks (Director of Criminal Prosecutions, Department of Law), Judge Victor Carlson (Anchorage Superior Court), Stephanie Cole (Deputy Administrative Director, Alaska Court System), and Avrum Gross (former Attorney General, State of Alaska). Finally, we thank the Judicial Council members and staff who have contributed greatly throughout the project to its success, and the many others who have taken the time to make comments and suggestions about the work.

TABLE OF CONTENTS

	<u>Page</u>
LIST OF TABLES	iv
LIST OF FIGURES	vii
FINDINGS AND RECOMMENDATIONS	1
1. Screening	2
2. Charge Bargaining	2
3. Sentencing	3
CHAPTER I - THE PERSISTENCE OF THE PROHIBITION ON PLEA BARGAINING	8
A. The Policy Today	10
B. Argument for Continued Existence of the Policy	12
C. Argument for Decay of the Policy	17
D. Summary of Evidence Regarding the Existence of the Policy Prohibiting Plea Bargaining	25
CHAPTER II - LONG TERM EFFECTS OF THE BAN	27
A. Case Dispositions and Conviction Rates: An Overview of Case Processing	27
B. Screening of Cases	35
1. Overview of Screening	36
2. Statistical Evidence	39
3. Screening Standards	40
4. Summary	47
C. Charge Reductions and Dismissals	48
1. Historical Development of the Current Policy	48
2. Current Charge Reduction and Dismissal Practices	53

TABLE OF CONTENTS (Continued)

	<u>Page</u>
3. Amount of Charge Negotiation; Timing of Charge Reductions and Dismissals; Types of Charge Reductions . . .	66
4. Comparison to Other Jurisdictions	87
5. Summary	88
 D. Trials	 89
1. Trial Rates	91
2. Reasons for Trials	102
3. Trial Differentials or Tariffs	108
4. Perceptions of Trial Differentials	115
5. Other Factors in Avoiding Trials	118
6. Summary of Findings About Trials	120
 CHAPTER III - SENTENCING AND THE BAN	 122
A. The New Criminal Code	122
B. Presumptive Sentencing	125
1. History	128
2. Present Structure of Presumptive Sentencing	130
3. Previous Studies of Presumptive Sentencing	132
4. Perceptions of Presumptive Sentencing	133
5. Changes to Presumptive Sentencing	136
C. Patterns of Sentencing from 1974 through 1987	137
1. General Sentencing Patterns	138
2. Disparities in Sentencing	145
D. Plea Bargaining and Sentencing	152
1. Historical Perspective	152
2. Current Status of Sentence Negotiations	156
3. Sentencing Benefit from Plea Bargaining	160
4. Presumptive Sentencing and Plea Bargaining	164
5. Summary	167

TABLE OF CONTENTS (Continued)

	<u>Page</u>
REFERENCES	168
APPENDIX A - POLICY GUIDELINES MEMOS	A-1
APPENDIX B - STATISTICAL METHODOLOGY	B-1
DATA COLLECTION FORM	B-11
NUMBER OF CASES	B-15
APPENDIX C - CHARGE AND SENTENCING TABLES	C-1

LIST OF TABLES

<u>Table</u>	<u>Page</u>
1 Summary of Case Outcomes, Anchorage, Fairbanks and Juneau	32
2 Summary of Case Outcomes, Anchorage	33
3 Summary of Case Outcomes, Fairbanks	34
4 Screened-Out Case By Type of Offense	38
5 Incidence of Pleas With Reduction or Dismissal of One or More Charges	50
6 Incidence of Pleas With Dismissal of One or More Charges	56
7 Plea to Reduced Charge by Type of Offense	59
8 Incidence of Pleas With Reduction or Dismissal of One or More Charges, by Specific Offense, Anchorage, Fairbanks, Juneau	62
9 Interview Estimates of Charge Reductions	67
10 Incidence of Pleas with Reduction or Dismissal of One or More Charges, Convicted Cases Only, Anchorage, Fairbanks, Juneau	69
11 Incidence of Pleas with Reduction or Dismissal of One or More Charges, Anchorage Filed Cases	72
12 Timing of Charge Reductions With Plea	73
13 Incidence of Pleas with Reduction in Most Serious Arrest Charge or Dismissal of One or More Charges, Fairbanks	75
14 Convictions by Location, Convicted Cases Only	77
15 Charge Reductions by Specific Offense, Convicted Only	79
16a Hypothetical Sexual Abuse Case Most Likely Disposition, By Attorney Type and Location	80
16b Hypothetical Robbery Case Most Likely Disposition, By Attorney Type and Location	83

LIST OF TABLES (Continued)

<u>Table</u>	<u>Page</u>
17 Incidence of Reduced or Dismissed Charges for Sexual Abuse of a Minor I Cases	85
18 Incidence of Reduced or Dismissed Charges for Robbery I Cases	86
19 Comparison of Charge Reduction Rates, Alaska and Other Jurisdictions	87
20 Filed Trial Rate by Type of Offense	92
21 Trial Rates: Alaska and Other Jurisdictions	93
22 Effect of Screening on Trial Rates	95
23 Ratio of Judges to Felony Trials, Anchorage, Fairbanks, Juneau	98
24 Operating Budgets, State Criminal Justice Agencies, 1977-1989	99
25 Convictions by Trial vs. Plea	103
26 Sentences for Selected Offenses by Trial vs. Plea, Statewide	109
27 Characteristics of Plea vs. Trial Defendants	111
28 Presumptive and Mandatory Minimum Sentencing Terms	131
29 Offenders Sentenced to Jail ("In/Out" Decision) by Offense, Anchorage, Fairbanks, Juneau	140
30 Mean Active Sentence Length (in Months) for Selected Offenses, Anchorage, Fairbanks, Juneau	141
31 Percent of Offenders Sentenced to Jail ("In/Out" Decision) By Offender Characteristics	146
B-1 1989 Alaska Plea Bargaining Study Sample Design	B-10
B-2 Number of Original Cases Reflected in Data File	B-16
C-1 Charge Changes, Most Frequent Convicted Offenses	C-1
C-2 Murder and Kidnapping	C-11

LIST OF TABLES (Continued)

<u>Table</u>		<u>Page</u>
C-3	Violent Offenses	C-12
C-4	Property Offenses	C-13
C-5	Sexual Offenses	C-15
C-6	Drug Offenses	C-16
C-7	Other Offenses	C-17
C-8	Case Disposition Time for Filed Cases	C-19

LIST OF FIGURES

<u>Figure</u>	<u>Page</u>
1 Arrest Conviction Rates	28
2 Filed Conviction Rates	28
3 Case Screening Rate	36
4 Plea with Dismissal of One or More Charges, Anchorage, Fairbanks, Juneau	55
5 Plea With One or More Charges Reduced, Anchorage, Fairbanks, Juneau	58
6 Plea With One or More Charges Reduced or Dismissed, Anchorage, Fairbanks, Juneau	61
7 Plea With One or More Reduced or Dismissed Charges, Anchorage vs. Fairbanks	65
8 Timing of Reductions and Dismissals: Pled Cases With Reductions or Dismissals as Percent of Filed Cases	74
9 Filed Trial Rates, Anchorage, Fairbanks, Juneau	93
10 Number of Trial Cases, Anchorage, Fairbanks, Juneau	96
11 Number of Defendants Sentenced to Active Term, Anchorage, Fairbanks, Juneau	142
12 Convicted Active Prison Rates, Anchorage, Fairbanks, Juneau	143
13 Total Months of Active Sentence Imposed, Anchorage, Fairbanks, Juneau	145
B-1 Number of Filed Felony Cases 74-76, 84-87, Anchorage, Fairbanks and Juneau	B-15

FINDINGS AND RECOMMENDATIONS

FINDINGS AND RECOMMENDATIONS

The primary findings of this re-evaluation of Alaska's ban on plea bargaining are:

1. The initial results of the Attorney General's prohibition of plea bargaining were substantial decreases in both sentence and charge bargaining.
2. Fifteen years after the ban was established, it remained the official policy of the Attorney General's office. Although the policy continued to be effective in practice for sentence bargaining, which remained infrequent, charge bargaining had become fairly common in most parts of the state. The increase in charge bargaining appeared to be related to changes in Attorneys General and their staffs, reductions in funding for prosecution and other criminal justice needs, and to the revisions of the criminal code and adoption of presumptive sentencing.
3. Increased attention to the screening and charging decisions resulted in higher standards for the acceptance of cases. The standard shifted from a "probable cause" standard to a "beyond a reasonable doubt" standard. The change resulted in better police investigations and more professional decisions by police and prosecutors. Improved screening was believed by many attorneys and judges to have been the most important effect of the ban on plea bargaining.
4. Over the past fifteen years, the percentage of convicted offenders sentenced to some jail time has increased substantially, and the mean active sentence length for those sentenced to jail has lengthened. These shifts probably resulted as much from increased societal concerns about crime as from the ban on plea bargaining and presumptive sentencing.
5. In a separate report (Appellate Sentence Review in Alaska) prepared as part of this re-evaluation of the ban, the Council concluded that "the appellate courts' decision to determine the justice of non-presumptive sentences by referring to the

presumptive sentencing structure has had far-reaching effects on the entire criminal justice system." The report notes that the variable of judge identity no longer contributes significantly to mean active sentence length, probably because of the combined influences of presumptive sentencing and the appellate courts' guidelines and benchmarks.

Based on these findings, the Judicial Council makes the following recommendations:

1. **SCREENING:** The Judicial Council recommends that the present high standards for screening be maintained.

According to most persons interviewed, the present screening policy is a positive influence on the quality of cases and a useful tool for prosecutors. If extra time is needed for screening cases in some situations (especially in rural areas), that need could be formally recognized in the written policy guidelines.

2. **CHARGE BARGAINING:** The Judicial Council recommends that the Attorney General clarify the current policy on charge bargaining.

It appears that the legal community's perception of the current prosecutorial practices related to charge reductions and dismissals are substantially at odds with the Attorney General's written policy that prohibits charge bargaining. The current policy is stated as:

Unless specifically approved by the Attorney General or the Chief Prosecutor prior to the initiation of any negotiations, prosecuting attorneys will not enter into any agreement or understanding with a defendant or his attorney that is designed to lead to the entry of a plea of guilty...that in any way involves a concession with respect to the charge to be

filed or which involves an agreement to dismiss or reduce a charge, except as provided under subsection (2) below."¹

Subsection (2) permits the prosecutor, in multiple count cases (excluding felony violent offenses) to communicate to the defendant prior to the entry of a plea that counts may be dismissed if the defendant pleads to the "'essence' of the conduct engaged in," if the office supervisor approves the dismissals, and if the dismissed counts are mentioned at sentencing.

Despite this statement of policy prohibiting "charge bargaining," most prosecutors, defense attorneys and judges interviewed said that charge bargaining occurred fairly routinely in most parts of the state. In general, they perceived this as a different situation than existed in the late 1970s and early 1980s. The statistical evidence also supported the hypothesis that charge bargaining increased substantially in the mid- to late-1980s.

The Judicial Council takes no position with respect to the practice of charge bargaining. The Attorney General may wish either to reiterate the present written policy and encourage its application in practice, or he may prefer to incorporate the existing practices into his policy. In either case, the written policy and actual practice should be consistent to avoid confusion in the legal community and with the public.

3. SENTENCING:

1. Some aspects of presumptive sentencing should be re-considered.

¹ ALASKA DEPT OF LAW, CRIMINAL DIVISION, STANDARDS APPLICABLE TO CASE SCREENING AND PLEA NEGOTIATIONS (Effective July 1, 1980) 14 (June 1, 1980) [hereinafter 1980 STANDARDS]. See Appendix A for excerpts of pertinent sections.

The legal community does not appear to have achieved a consensus about the merits of presumptive sentencing. Attorneys, judges, police and probation officers interviewed over the past two years expressed some satisfaction with the greater uniformity of sentences, but many were concerned that the length of presumptive sentences for some first felony offenders was too great, or that presumptive sentencing was too inflexible for first offenders' situations. Little concern was expressed about presumptive sentences for repeat offenders; most appeared to believe that presumptive sentences were generally appropriate for them.

Presumptive sentencing affects the entire criminal justice system, from influencing arrest and charging decisions made by prosecutors to affecting the numbers of offenders going to trial, and contributing to overcrowded prisons. Although the ideas underlying presumptive sentencing still appear useful, re-thinking the implementation of those ideas could be helpful. For example, in the original presumptive sentencing proposals made by Professor Alan Dershowitz, sentences were tied to narrowly-defined offenses. When presumptive sentencing was adopted in Alaska, it was combined with a criminal code in which the emphasis was on broader definitions of offenses, and in which sentences were imposed based on a system that classified all offenses into six general groups. Presumptive sentencing in Alaska might better meet the needs of practitioners and legislators if sentences were more closely tied to specific offenses.

Other proposals that have been made for altering presumptive sentencing include expanding it to cover all first felony offenders and all misdemeanants, shortening the lengths of some terms, increasing others, and providing discretionary parole. The Judicial Council does not take a position on any specific proposal. Rather, based on the interviews and information compiled in the course of the past ten years, the Council

recommends that the legislature, through the Alaska Sentencing Commission, carefully review presumptive sentencing and its interactions with other statutes and case law, as well as its effects on the operations of the criminal justice system.

2. The Judicial Council recommends that the legislature establish procedures to thoroughly evaluate existing and proposed sentencing provisions to compare the relative seriousness of offenses, and carefully consider the full range of costs associated with new sentencing proposals. This process should begin immediately, before Alaska develops the virtually unsolvable prison overcrowding problems found in so many other states.

While the comparative contributions of presumptive sentencing, the plea bargaining ban and the changes in public attitudes in favor of tougher sentences are not necessarily clear, it is apparent that these factors in some combination (together with factors of population and resource increases) have led to overall longer sentences and a much larger prison population. Alaska ranked fourth among the states in 1987² in the percentage of its population that it incarcerated.

In spite of Alaska's relatively large prison population, prison overcrowding is much less of a problem in Alaska than in many other states. Abundant state resources, especially before 1986, allowed Alaska the flexibility to greatly increase funding for its criminal justice agencies. However, those substantial state resources are apparently a thing of the past.

Alaska is not the only state that has adopted determinate sentencing laws that emphasize substantial prison terms. However, to the extent that the

² Austin & Brown, "Ranking the Nation's Most Punitive and Costly States," FOCUS 2 (Nat'l Council on Crime and Delinquency) (July, 1989).

plea bargaining ban still exists in Alaska, prosecutors' flexibility to take into account economic realities in sentencing is constrained. There is substantially less chance of a reduced sentence in exchange for a plea in Alaska than in most other states. Further, it is likely that at least one reason for the increase in charge bargaining in Alaska is the perception of the actors in the criminal justice system that system resources are becoming more scarce.

This is not to say that plea bargaining, either in the form of sentence or charge bargaining, should be encouraged. Plea bargaining, to the extent it allows the system to conserve scarce resources, does so only by overriding the legislative intent that particular conduct constitutes a particular crime that should be sanctioned in a particular way. Further, the costs of the plea bargaining ban have not been as great as anticipated and the benefits have been substantial.

Nevertheless, the consequence of Alaska's tough sentencing laws in the face of limited state resources inevitably will increase pressure on the system to increase plea bargaining and to make other systemic changes to allow the criminal justice system to continue to function. If the legislature structures its criminal code and sentencing provisions to incarcerate felons to a greater extent than it can pay, the consequence can only be a deterioration in many aspects of the criminal justice system.

The Alaska legislature has already taken the first step in this regard by establishing the Alaska Sentencing Commission.³ The Commission is charged, among other duties, with considering the "seriousness of each offense in relation to other offenses," "alternatives to traditional forms of incarceration," and "the projected financial effect of changes in sentencing laws and practices." This Commission can go a long way towards solving

³ ALASKA STAT. § 44.19.561-577 (1990).

problems in Alaska's sentencing structure before the structure becomes unmanageable.

3. The Judicial Council recommends that the legislature, through the Alaska Sentencing Commission, examine the benchmarks established by the state's appellate courts to guide the discretion of judges.

The legislature and the Sentencing Commission should examine the various benchmarks set by the courts to determine first whether there is sentencing law in those decisions that would be more effectively addressed by statutes; and second, whether the benchmarks and sentencing criteria could be summarized in a way that would make them easily accessible to judges, attorneys and the public.

The Supreme Court and Court of Appeals have established many benchmarks and criteria to guide the discretion of sentencing judges. The appellate courts' decisions have been extremely helpful in structuring sentencing activity in the trial courts. However, because the decisions have not been compiled in one place, it is not always easy to find the current law on sentencing of a particular offense. Summarizing the case law related to sentencing, and possibly codifying portions of it, would have two primary benefits. It would permit other factors (such as the state's resources) that are inappropriate considerations for the appellate court, to be taken into account in setting benchmarks and guidelines. The process also would encourage input from agencies and persons affected by sentencing decisions, thus increasing the opportunities for accountability.

CHAPTER I

THE PERSISTENCE OF THE PROHIBITION ON PLEA BARGAINING

CHAPTER I

THE PERSISTENCE OF THE PROHIBITION ON PLEA BARGAINING

When Alaska Attorney General Avrum Gross banned plea bargaining in 1975, few thought that the policy still would be in effect fifteen years later. Although the National Advisory Commission on Standards and Goals (1973) had called for the abolition of plea bargaining in all states by 1978,⁴ most experts considered such a ban impossible, undesirable, or both.⁵ Many attorneys and scholars predicted that banning plea bargaining would result in a flood of defendants exercising their right to trial, a flood that would jam the courts and create huge backlogs.⁶ Others suggested that it would be impossible to truly ban plea bargaining because it simply would be forced underground or changed in nature.⁷ In addition, some attorneys argued that plea bargaining was a more just and rational way to resolve cases because it enabled the parties with the best knowledge of the case--the prosecutor and defense attorney--to decide the outcome.⁸

The prohibition of plea bargaining included all sentence recommendations for a particular sentence in exchange for a plea of guilty (or nolo contendere), and any change

⁴ U.S. NATIONAL ADVISORY COMMISSION ON STANDARDS AND GOALS, COURTS 50 (1973).

⁵ See Church, In Defense of "Bargain Justice," 13 LAW AND SOCIETY REVIEW 508 (Winter 1979); Brunk, The Problem of Voluntariness and Coercion in the Negotiated Plea, *id.* at 524; Hermann, Adapting to Plea Bargaining: Prosecutors, in CRIMINAL JUSTICE: LAW AND POLITICS 153 (G. Cole ed. 1984).

⁶ See, e.g., People v. Byrd, 162 N.W.2d 777, 782 (Mich. App. 1968) (Levin, J., concurring).

⁷ W. McDONALD, PLEA BARGAINING: CRITICAL ISSUES AND COMMON PRACTICES 26 (1985); see also, Cohen and Tonry, Sentencing Reports and Their Impacts, in 2 RESEARCH ON SENTENCING: THE SEARCH FOR REFORM 316 (1983).

⁸ RUBINSTEIN, WHITE AND CLARKE, THE EFFECT OF THE OFFICIAL PROHIBITION OF PLEA BARGAINING ON THE DISPOSITION OF FELONY CASES IN THE ALASKA CRIMINAL COURTS 242 (December 1978), reprinted by the Government Printing Office as ALASKA BANS PLEA BARGAINING (1980) [hereinafter ALASKA BANS PLEA BARGAINING].

in the charge(s) if done solely to obtain a plea of guilty.⁹ Exceptions to the policy were allowed if they were approved in advance by the Attorney General's central staff. Mr. Gross emphasized the need to increase prosecutorial screenings of police charges, both to prevent over charging and to keep the prosecutors' caseloads manageable. Because all state prosecutors are employed by the Attorney General in the Department of Law (rather than being elected or appointed at a county level)¹⁰ it was possible to prohibit plea bargaining with a simple intra-office policy statement.

The first evaluation of the Attorney General's policy found that plea bargaining had been substantially curtailed during the first years after the ban.¹¹ The Alaska Judicial Council's assessment of the ban, funded by the National Institute of Justice, cited data showing that despite a doubling in the trial rate, cases actually were disposed of more quickly than in the year prior to the ban.¹² The ban appeared to lengthen sentences for relatively "clean" offenders, but left sentences for more serious offenders untouched.¹³ However, at least one of the report's authors argued that the system was poorer for the absence of plea bargaining, because judges were not able to make well-informed sentencing decisions.¹⁴

Critics of the policy suggested then, and now, that despite its official status the policy was never enforced. A few defense attorneys said that their access to negotiated pleas was not inhibited by the policy. Others have suggested that because the data showed little substantial change in reductions and dismissals of charges in the first year after the ban that there is no proof that plea bargaining ever stopped. The fact that

⁹ See infra Appendix A for the full text of the Attorney General's memos to prosecutors and judges about the policy.

¹⁰ Several of the larger municipalities employ their own prosecutors to enforce municipal ordinances. These prosecutors continue to plea bargain; however, they handle only misdemeanors.

¹¹ ALASKA BANS PLEA BARGAINING, supra note 8, at 31 and 219.

¹² Id. at 120.

¹³ Id. at 111-113.

¹⁴ Id. at 242.

sentences imposed after pleas of guilty or nolo contendere tend to be shorter than those imposed after conviction at trial is another indication of continuing plea bargaining to at least some observers.¹⁵

Alaska's criminal justice system has changed significantly, however, since 1975. In the face of a new criminal code,¹⁶ new provisions for presumptive sentencing,¹⁷ and a drastically altered state economy¹⁸ the persistence of the ban on plea bargaining has been an open question. The purpose of this report, funded by the State Justice Institute in 1988, is to assess the evidence for the continued existence of the ban and to analyze its interactions with the other major changes in the state's criminal justice system during the fifteen years of its existence.

A. The Policy Today

The state's Attorney General still maintains an official policy prohibiting the use of plea bargaining in most situations. But today's policy is somewhat different than that

¹⁵ McDONALD, supra note 7, at 6.

¹⁶ The revised criminal code was adopted in 1978 (Act of July 17, 1978, ch. 166, 1978 Alaska Sess. Laws 219 (effective Jan. 1, 1980) (codified at ALASKA STAT. 12.55)). For an overview of the Criminal Code Commission and its work, see Stern, "The Proposed Alaska Revised Criminal Code," 7 UCLA - ALASKA L. REV. (7) 1, 1-74 (1977). The code revision included all common offenses except drugs; those were re-codified in 1982.

¹⁷ Presumptive sentencing for all repeat felony offenders and a few first felony offenders convicted of violent crimes where a firearm was used or serious physical injury resulted was adopted in 1978. It was revised by the Legislature in 1982 and 1983 to include all first felony offenders convicted of Class A offenses, as well as the unclassified offenses of Sexual Assault I and Sexual Abuse of a Minor I. See Stern, "Presumptive Sentencing in Alaska," 2 ALASKA L. REV. 227 (1985), for a detailed discussion. Chapter III, infra, discusses presumptive sentencing in relation to the ban and to non-presumptive sentences.

¹⁸ The state's economy has cycled through two boom/bust periods since 1975. During construction of the Alaska pipeline for transport of oil from the North Slope, the economy benefitted from increasing population and substantial construction money. That period started about 1974 and ended about 1978. The economy was relatively weak from 1978 until 1981, when oil prices increased and state's revenues soared. Population and construction increased rapidly until late 1985, when oil prices dropped suddenly. The state lost population in 1987 and 1988, but began to recover in 1989. The economic ups have contributed substantial resources for increased law enforcement and justice system agencies; the economic downs and subsequent limits on justice system funding have been used to argue for increased plea bargaining.

promulgated by Attorney General Gross in 1975. The policy was significantly modified in 1980 and written guidelines were published by then-Attorney General Wilson Condon.¹⁹ The most important changes made at that time were allowing the defendant to plead to a charge or charges that reflect the "essence of the conduct engaged in," and decentralizing responsibility for exceptions to the policy by allowing exceptions to be handled by the District Attorney for each area.²⁰ A second major modification was implemented late in 1986 by then-Attorney General Harold Brown.²¹ This change permitted prosecutors to recommend a specific sentence that would have been "reasonably foreseeable after a trial" if the defendant had been tried.²²

The more important modifications, however, appear to have evolved over the years, especially during the 1980s, as local district attorneys were given progressively more leeway in implementing the policy without frequent consultation with the central office in Juneau. A continuum of perceptions of the policy still exists, ranging from those who profess ignorance of any prohibitions on plea bargaining to those who contend that exceptions to the policy are rare and that most pleas occur without specific agreed-upon concessions from the prosecutor. The most general understanding of the policy however, even among many prosecutors, is that sentence bargains are prohibited, absent special circumstances, but that charge bargaining is allowed.

This understanding varies greatly among the different communities of the state. One of the primary findings of the original study was that implementation of the policy

¹⁹ See 1980 STANDARDS, supra note 1.

²⁰ Id. at 24-25.

²¹ Memorandum from Attorney General Harold M. Brown to All District Attorney Offices, at 1 (November 26, 1986). See Appendix A for text of memo.

²² Id. at 1.

was dependent in large measure upon the identity of the community being evaluated.²³ Even in 1975 and 1976, plea bargaining in the rural areas (the "Bush") was little abated by the policy. In Fairbanks, the District Attorney who took office in January of 1975 had instituted his own local ban on plea bargaining six months prior to the Attorney General's statewide ban. Throughout the report, the variable of location should be kept in mind because it continues to substantially affect virtually every aspect of the criminal justice system.

Has the policy decayed in the past fifteen years? Or can it be said to have evolved into a stable aspect of Alaska's criminal justice system? The evidence supports both assessments. The balance of this chapter will explore the interview data on either side of the question and show that both perspectives contribute to an understanding of the whole picture.

B. Argument for Continued Existence of the Policy

A variety of observations support the hypothesis that the Attorney General's policy prohibiting most plea bargaining still exists in practice as well as in the written form. Many interviewees describe a partial ban, covering sentence bargaining, and a small number perceive a ban on both charge and sentence bargaining. An attorney accustomed to a system in which plea bargaining occurs openly and routinely would probably find Alaska's present system somewhat foreign. Certainly attorneys who practiced in Alaska prior to the ban and who continue to do so, do not (with a few exceptions) see the 1990 system as resembling the 1975 system.

Attorneys and judges interviewed in a series of semi-structured interviews during the fall of 1989 were asked first, whether there was a ban on plea bargaining and second,

²³ ALASKA BANS PLEA BARGAINING, *supra* note 8, at 235-238. Thomas Church, et al., described the phenomenon of "local legal culture" in JUSTICE DELAYED: THE PACE OF LITIGATION IN URBAN TRIAL COURTS 54 (1978). In Alaska, Fairbanks traditionally has been described as "adversarial," and southeast as "collegial." Anchorage has a more urban and diverse local legal culture.

what their understanding of the ban was.²⁴ A large majority agreed that there was still a ban on plea bargaining. One prosecutor summed up her perception of the ban:

The state is not supposed to overcharge crimes beyond what [it] can prove. The state is not to charge for the sole purpose of negotiating. After pre-indictment there is not supposed to be any negotiating. The state is not supposed to make sentence deals. All deviations from the policy must be approved by the office supervisor or the chief prosecutor.

The ban does not prohibit the consolidation or reduction in the number of counts, and it does not prohibit the defendant from pleading to a higher charge with the understanding that the lesser charges will be dismissed.

A long-time public defender viewing the policy from his perspective gave a less formal description:

[As a] general rule there is a ban but there seem to be enough exceptions. It appears that the ban is not what it used to be. I still think it is distinguishable from plea bargaining in other jurisdictions. We have charge bargaining but not plea bargaining.

²⁴ About forty attorneys and judges, thirty or more police officers and several probation officers who had worked in the Alaska justice system between the early 1970s and mid-1980s were re-interviewed for the present study. Another group of more structured interviews were conducted with just over a hundred attorneys and judges throughout the state. Most judges, prosecutors, public defenders and private defense attorneys with more than six months experience were contacted and participated. Finally, a group of about thirty defendants was interviewed. The defendants were all incarcerated because it was very difficult to arrange interviews with probationers. An attempt was made to find reasonably articulate defendants who had been recently convicted of a variety of offenses. Resources did not permit the use of a stratified sampling procedure, and in any case, Alaska's number of recently-sentenced felons was small enough that finding offenders who met specific criteria would have been difficult.

The first evaluation of the policy prohibiting plea bargaining relied on interviews with over a hundred attorneys, judges, and police officers, many of whom were interviewed at least twice. Findings and extensive quotes from these interviews comprised the first half of the 1978 evaluation of the policy. These interviews were used again in this re-evaluation of the ban on plea bargaining to provide historical context for the current study's findings.

This interview suggested a distinction between plea bargaining and charge bargaining that was not made by Avrum Gross in his initial statement of the policy. In his first memorandum to all district attorneys and assistant district attorneys on July 3, 1975,²⁵ Mr. Gross said:

(1)...District Attorneys and Assistant District Attorneys will refrain from engaging in plea negotiations with defendants designed to arrive at an agreement for entry of a plea of guilty in return for a particular sentence...

(4)...While there continues to be nothing wrong with reducing a charge, reductions should not occur simply to obtain a plea of guilty.

Attorney General Gross intended to prohibit both charge and sentence bargaining, and used the term plea bargaining to include both phenomena. Because this report evaluates the Attorney General's policy, his definition of the term will be used throughout; where interviewees and others are using the phrase differently, it will be noted.

A difference in enforcement of the ban depending upon the area of the state is common knowledge. A district attorney in Palmer described the ban:

I do not think there is a clear ban; plea bargaining is frowned on to some degree.

In felony cases there is a strong policy to avoid specific sentence agreements. And there is a policy, which is not so strong, to charge the charge you intend to prosecute.

A public defender in Fairbanks perceived a much stricter policy:

²⁵ See infra Appendix A.

Officially there are to be no plea or sentence negotiations except in exceptional cases. Depending upon how willing the D.A. is to negotiate a case, it may or may not be considered exceptional. There is appreciably less negotiation in Fairbanks than in other parts of the state.

Although conventional wisdom held that the ban never was intended for the rural areas of the state, and that no one in the Bush followed it, a fairly large number of the attorneys actually working in those communities believed that there was a ban in effect. In Bethel, a public defender noted that the local prosecutors were "very careful not to show an appearance of plea bargaining." Because he had worked in other communities, he added that in those other areas, there was not always the "sensitivity to the prohibition that there is in Bethel."

Nome and Kotzebue attorneys also perceived a policy against the use of plea bargaining, albeit a flexible one. One said:

Nobody gets in trouble violating the ban unless they make a bad decision. I recognize there is a ban.

Another said:

My impression is that there is not a ban, but a restriction. It is not the way it was under Gross....The basic concept is that it is generally not the Department of Law's responsibility to decide what the sentence is going to be.

Attorneys also were asked to speculate about what might happen if there were no longer a ban. Although some said that things would be no different, the majority thought that the system would change in various ways. Fewer trials, less care taken in police work, less diligent prosecutors and greater efficiency in the criminal justice system were all perceived results of eliminating the ban. Even attorneys who said that the ban was pro forma or non-existent responded to the question about elimination of the ban with possible changes.

It would weaken uniformity; depending upon how the system was set up. More work for DA's and PD's in the negotiating process. Maybe fewer trials, but more motion filing. DA shopping and uniformity in the treatment of different defendants would be affected. Uniformity is an important consideration at sentencing.

From my viewpoint, the ban has essentially been eliminated but the public still perceives the ban is in place. I think it has been eliminated but that fact has not been publicized. If it were, the effect would be a lowering in the prison population, it would be less costly to dispose of cases, and there would be fewer trials.

One other piece of evidence regarding the evolution of the ban came from a manual for defense attorneys prepared for the Alaska Bar Association's Continuing Legal Education program.²⁶ The manual mentioned plea negotiations in several places, and described the policy for Anchorage as:

Plea bargaining (i.e., sentence agreement) is standard practice for cases prosecuted by the Municipality of Anchorage.²⁷ It is rarer in misdemeanors prosecuted by the state.

Felony change of pleas are usually scheduled through the judge assigned to the case. Charge bargaining with the state is fairly common. Classic plea bargaining is much less common.²⁸

The manual also describes practices in other parts of the state. Although plea negotiations are not mentioned in the pointers given for Juneau, and for the Second Judicial District (Barrow, Nome, Kotzebue courts), Fairbanks policy is noted:

²⁶ S. ORLANSKY, CRIMINAL DEFENSE, Alaska Bar Association CLE program (April 1989).

²⁷ The Municipality of Anchorage governs the city of Anchorage. It employs its own prosecutors, who were not affected by the ban, and who continued to routinely plea bargain their cases. A former municipal attorney commented that increased screening out of misdemeanors by the state prosecutors resulted in a larger municipal prosecutor caseload, because police whose cases had been rejected by the state would refile the same charges under parallel municipal ordinances.

²⁸ S. ORLANSKY, supra note 26, at 7.

Charge bargaining is common with state misdemeanors; classic plea bargaining (Rule 11) is rare in state misdemeanors, but is the norm in city misdemeanors.

[In] Felony changes of plea...[a]gain, charge bargaining is fairly common, but classic plea bargaining is not.²⁹

In conclusion, the interviews testified to the continued existence of an Attorney General's office policy restricting the use of plea bargaining in most cases. Although many perceived the policy to allow charge bargaining, most agreed that sentence bargaining was prohibited except under special circumstances (despite the 1986 modification), and that this prohibition was honored more often than not. Even attorneys who said that there was no ban thought the system would be different if the Attorney General's official policy changed.

C. Argument for Decay of the Policy

The Attorney General's policy is clearly not the same today as it was in 1975. Mr. Gross commented in 1988 that he had not expected it to remain as inflexible as it was during the first few years. He explained:

Initially it was very rigid. It had to be, otherwise everyone would get through the loopholes. But I knew it would soften; it had to. It was an experiment.³⁰ (Advisory Committee, 1988).

Another attorney who had practiced in the state since the early 1970s said, "The ban does not drive the system the way it used to." Evidence of this was seen in the fact that budget documents prepared for the legislature in the 1980s by criminal justice

²⁹ Id. at unnumbered, under "Fourth Judicial District (Fairbanks) Practice."

³⁰ Gross, Remarks at Meeting of Plea Bargaining Advisory Committee (July 1988) (available at Alaska Judicial Council library).

agencies used arguments other than the ban to justify their needs for additional staff.³¹ Presumptive sentencing, a new criminal code, and substantial changes in the state's population and economy had replaced the plea bargaining policy as persuasive arguments for budgetary adjustments.

Attorneys General who followed Mr. Gross changed the policy to give individual district attorneys more latitude in handling cases. Inevitably, these changes were perceived as allowing some types of plea bargaining, although the written directives were carefully phrased to emphasize the policy of "no plea negotiations." Under Mr. Gross's successor, Wilson Condon, guidelines were issued permitting a wider range of charge reductions and dismissals.³² The guidelines, dated June 1, 1980, reiterated the general policy of the Department of Law that "prosecuting attorneys for the State of Alaska will not engage in the practice of plea bargaining as defined above."³³ The definition of plea bargaining was:

...[A] process which involves discussions between the prosecution and the defendant or his attorney, if he is represented, that are designed to arrive at an agreement under which the defendant will waive his right to trial and enter a plea of guilty to one or more charges in exchange for some concession from the prosecution usually in the form of a reduced charge, a reduced number of charges and/or a particular sentence recommendation or agreement not to oppose a defense recommendation at sentencing.³⁴

The guidelines also allowed the defendant to plead

³¹ E.g., budget documents prepared by Department of Law for FY '87 (July, 1986 through June 1987) for funding from the legislature emphasized the state's increasing population, the increased numbers of child sexual abuse cases and the increased numbers of drug cases as reasons for funding new prosecutors and associated staff. The ban was not mentioned.

³² 1980 STANDARDS, supra note 19.

³³ Id. at 19.

³⁴ Id.

...to one or more counts included in the charging instrument which includes at least the major charge, if any, and which represents a plea to the 'essence' of the conduct engaged in and represented in the original charging document,³⁵

The prosecutor was required by the guidelines to obtain specific approval from the supervising attorney before dismissing the remaining counts.³⁶ The guidelines also noted that "information pertaining to the additional count or counts may be fully related to the court at sentencing."³⁷ This option became an item of discussion and negotiation between prosecutors and defense attorneys, along with discussions of whether to file aggravating and mitigating factors in presumptive sentencing cases, recommendations about probation conditions, and other factors related to the sentence.

The 1980 change was described by an assistant district attorney as "a major change" that "allowed some negotiation if the defendant pled to the essence of the crime committed." Another long-time attorney noted that around the time these guidelines were issued, the central office in Juneau was "easing up on...control of all bargains." It was no longer necessary to "consult with upstairs" on every case. This attorney's theme was common among long-time lawyers: as the prosecutors' offices became more professional (which had been one of the purposes of the ban), more trust was placed in local offices. Turnover among prosecutors was lower as well, which encouraged decentralization of authority.

The next Attorney General, Norman Gorsuch, did not make any significant alterations to the guidelines. His successor, Harold Brown, issued a memo on November 26, 1986, near the end of his term, permitting sentence recommendations in cases in which the sentence that would be likely after trial could be predicted:

³⁵ Id. at 24-25.

³⁶ Id. at 25.

³⁷ Id.

...Part II-C of the Standards is modified to allow each office, through the supervising attorney or the intake attorney if one is designated, to make specific sentencing recommendations or to agree to not oppose a recommendation. This authority may be exercised in cases involving non-presumptive sentences when, based on experience and professional judgment, the specific sentence being recommended would be reasonably foreseeable after a trial. This authority may also be exercised in cases involving presumptive sentences when an analysis of cases involving similar facts, including aggravating or mitigating factors and published or unpublished appellate decisions, provide specific guidance as to an appropriate sentence. Non-trial dispositions in unclassified and class A felony cases require the approval of the Central Office unless they are governed by an exception in the Standards that existed prior to this modification.³⁸

One district attorney described the motivation for this new provision as "The intent was to allow for plea bargaining without taking the political heat." Another phrased the new modification rather more elegantly:

[You] may have an agreed recommendation between the prosecutor and the defendant. These specific recommendations are not binding on the courts, but are meant to encourage the courts to be led to an area of a proper sentence, rather than having the attorney provide the sentence for them. The recommendations made are influenced by the prosecutor's perception of what should happen in the case rather than what he needs to say to get the defendant to change his plea. The prosecutor and defense attorney talk to one another; it has become much healthier. If you talk openly about your assessment of the case, then the defendant is more likely to enter a plea.

These formal changes to the policy combined with the other events structuring the Alaskan criminal justice system at the time to create an environment conducive to wide-spread charge bargaining. One assistant district attorney said:

³⁸ Memorandum from Attorney General Harold M. Brown, supra note 21, at 1-2.

Officially, there is an absolute ban. But...[c]harge bargaining is acceptable and at times flat out plea bargaining is acceptable. They want approval by Juneau for flat out plea bargaining where both sides get together and set out charge and sentence agreements.

Another prosecutor said:

There always has been a formal ban. The ban has been lessened more and more over the past five years to the point that it is more in name only.

An assistant public defender agreed with the timeframe described by the prosecutor:

[In the mid-1980s] D.A.s wouldn't plea bargain. They gave no quarter. I had a client who died and they were really upset because they had to dismiss the case and it would show up as a dismissal on their stats....In 1986 or so, everyone started mellowing out. They became more aware of resource problems and of the costs of keeping all these geriatric presumptive prisoners.

A private defense attorney in Southeast summed up the current situation:

The policy was honored for a long time. For the past several years, lip service is paid to it, but as far as adhering to it, bargaining is done in four sets of circumstances. 1) When the DA has charged too great a crime to begin with, which is done as a pressure device. 2) If the case is weak. If the DA has a healthy respect for the defense attorney, [he] will plea bargain; if not, no bargain. 3) Time constraints on the DA's office, with limited resources and heavy caseload mean it's not physically possible to meet deadlines. 4) Other exceptions include a) sex offense cases and multiple charge drug cases; b) defendants who need treatment rather than incarceration, mental aberrations; and c) the DA will agree to drop all but the most serious charge for a plea.

Even in Fairbanks, the city in which the policy always was most rigorously enforced, there was widespread agreement in 1989 that charge bargaining was permitted under the existing Attorney General's guidelines. Interviewed in 1978, the District Attorney said:

If the defendant pleads guilty to seven out of ten counts, that will be enough to show a continuing course of conduct on his part. It's very important to make it clear that dismissal is not strictly a quid pro quo. What we will tell him is that from an economic standpoint, and from the standpoint of doing justice, we don't think it's worth our while to try the other three counts.³⁹

According to the same district attorney, interviewed in 1989:

Sentence bargaining is what the ban addressed. Structured approval requirements for charge bargaining were included in the ban. There has always been plea bargaining but it has been within the structured guidelines of the Department of Law.

Although these interpretations of the ban sounded somewhat consistent, they were in stark contrast to interviews from the middle '70s with other attorneys about the situation in Fairbanks:

The district attorney only knows a few words: "We'll take it up on appeal," and "Take them to trial!" There were those who exercised some independent judgment, but because so many people have quit, the D.A. has been able to hire all those soldiers who will do just what he says.⁴⁰

³⁹ ALASKA BANS PLEA BARGAINING, supra note 8, at 58.

⁴⁰ Id. at 47.

In 1989, however, although most agreed that Fairbanks was still the one place where the ban retained many of its original contours, some Fairbanks attorneys and judges questioned whether there was a ban even there:

The state will engage in charge bargaining which, technically, is not a plea bargain. There is a general ban in practice on plea bargaining....There is no agreement to sentencing with felonies. The DA will agree not to pursue or suppress certain aggravators or mitigators.

The DA will plea bargain if there are multiple counts, or if they run out of time or have problems with a witness. The only thing they won't do is recommend a certain amount of time, but they will agree not to oppose a sentence presented by the defense. If the defendant pleads to one or more counts, the DA will agree to dismiss the remaining charges.

Yes and no. Technically there is a ban. But, you can settle a criminal case; plead to one with one dismissed....We are careful not to call the settlement a plea bargain.

In the Judicial Council's earlier report evaluating the ban on plea bargaining, the authors concluded that:

[P]lea bargaining as an institution was clearly curtailed. The routine expectation of a negotiated settlement was removed; for most practitioners justifiable reliance on negotiation to settle criminal cases greatly diminished in importance. There is less face-to-face discussion between adversaries, and when meetings do occur, they are not usually as productive as they used to be.⁴¹

In contrast, Anchorage prosecutors described the routine "pre-indictment" hearings in 1989 as opportunities for charge bargaining in most cases:

⁴¹ Id. at 31.

In practice the policy is held to once the case gets out of intake, but a lot of charge bargaining and sentence bargaining goes on at intake.

Before a case goes through intake there is quite a bit of negotiating at the pre-indictment stage, but not much after that. The state is not supposed to overcharge crimes beyond what we can prove. The state is not to charge for the sole purpose of negotiating.

Types of charge bargaining [prior to indictment] are: consolidating charges; dismissing less serious counts if the defendant pleads out to more serious offenses.

Other areas of the state did not use the pre-indictment hearing procedure to negotiate charges, but attorneys still bargained their cases. An assistant prosecutor in one of the smaller communities said:

Before I arrived in Alaska two years ago...I had heard there was no plea bargaining. I anticipated there would be no plea bargaining, but find I do as much here as I did in my former home....I believe the ban is followed more in Anchorage than anywhere else in the state.

An assistant public defender with experience in several areas of the state said there was no ban:

Plea bargaining is allowed under the rules. Department of Law has said there is a ban but I don't know what they mean by it. They use prosecutorial discretion in charging. If there were a ban, we'd have a lot more trials.

Another attorney commented that the ban was a tool in the prosecutors' arsenal:

I don't recall being encumbered by the ban [after 1980]. The ban was a device, like those used by car salesmen: "I'll have to ask the manager." Charge bargaining was commonplace. Sentence negotiation didn't happen without a commitment

from the chief prosecutor. That would happen in cases of violent rape and sex abuse.

A Department of Law attorney attributed some of the change to scarcity of resources for enforcing the prohibition:

The ban has changed. The paper change has not been that dramatic, but caseload has leveled off. The staffing levels may not ever have been up to caseload demands....The caseload per active prosecutor is high enough, particularly with misdemeanors that the ban as enunciated is not strictly adhered to. However, I still believe that with felonies there is a good faith effort to abide by the ban as codified in 1980.

One final piece of evidence for the decay of the ban came from a resume sent to the Judicial Council in application for a 1989 job. The attorney described his duties as an intern at the Alaska Public Defender agency:

For six weeks I represented misdemeanor defendants at all stages pre-trial, handled parole applications, plea-bargained, and assisted attorneys in trial preparation. (emphasis added)

D. Summary of Evidence Regarding the Existence of the Policy Prohibiting Plea Bargaining

The interviews from the late 1980s strongly suggested that although some attorneys paid relatively little attention to the Attorney General's policy in their practices, a prohibition on plea bargaining did exist for many others. The prohibition applied most strongly to sentence bargaining; most cases went to "open sentencing" at which both defense attorney and prosecutor presented arguments and recommendations, with the prosecutor stopping short of recommending a specific term of years. The formal plea bargains that were made seemed to be reserved for cases that traditionally would have been bargained, even under the policy at its strictest: sex abuse or assault cases, drug cases, and those involving informants. A special category of formal bargains

had been developed after 1987 to replace the former pre-trial diversion program, but this category did not account for a substantial number of cases.⁴²

The evidence from the interviews also unequivocally suggested that prosecutors regularly engaged in charge bargaining, although most of these bargains were never formalized as Rule 11 agreements. Attorneys appeared to interpret Rule 11 to only require notice to the court of an agreement if a recommendation by the prosecutor of a specific sentence was involved. Some saw the charge bargaining that occurred as consistent with the existing Attorney General's guidelines that spelled out a prohibition of charge bargaining; others believed that the situation was inconsistent with the policy but that bargaining was necessary or justified.

Whether the evidence was interpreted as supporting the proposition that the ban has evolved into a stable policy structuring the entry of pleas with relatively little of the bargaining that occurs in other jurisdictions, or whether it was interpreted as a decay of the policy into a shell maintained for public relations purposes, it was clear that the situation in Alaska in 1990 was not the same as it was in 1975. Then, sentence bargaining was the preferred mode of disposition of cases;⁴³ in 1990, a guilty or nolo contendere plea with reduced or dismissed charge(s) appeared to be the most frequent disposition of a case.⁴⁴ Then, police played a major role in determining the charge to be filed; in 1990, prosecutors were primarily responsible for charging decisions. Then, turnover was high among prosecutors and few had significant trial experience; in 1990, the prosecutors' offices were considered to be generally professional and experienced at trials.

⁴² The "SIS" or "Rule 11" program, as it is often titled by practitioners, permits defendants with generally good backgrounds and non-violent offenses to plead guilty or nolo contendere under Alaska Crim. Rule 11(e) with the agreement that the prosecutor will recommend a suspended imposition of sentence. (A suspended imposition of sentence ("SIS") allows the plea to be withdrawn if the defendant meets all of the conditions of the SIS, which may include jail time, community service, treatment, etc.) The program is most frequently used in Anchorage and the other larger communities.

⁴³ ALASKA BANS PLEA BARGAINING, supra note 8, at 1-12.

⁴⁴ See infra p. 62; Table 8.

CHAPTER II

LONG TERM EFFECTS OF THE BAN

CHAPTER II

LONG TERM EFFECTS OF THE BAN

Whatever doubts may exist concerning the persistence of the prohibition of plea bargaining, the ban clearly has had long-term effects.⁴⁵ Pre-filing screening of cases by prosecutors led to new standards for police investigations, resulting in increased police professionalism. Sentence recommendations for a specific term of years were severely curtailed and were still very uncommon in 1990. Charge bargaining, which had been secondary to sentence recommendations as the mode of negotiations prior to the ban, was infrequent for a period of time after the ban. During the mid- and late-1980s, charge bargaining became much more important as a means of case disposition. The next two chapters examine in detail each of these effects.

A. Case Dispositions and Conviction Rates: An Overview of Case Processing

The patterns of case convictions and type of disposition show possible effects of the ban on plea bargaining and subsequent changes in the policy. Figures 1 and 2 show arrest conviction rates and filed conviction rates.⁴⁶ These rates are often used to measure the effectiveness of justice system policies.

One of Attorney General Gross' reasons for prohibiting plea bargaining was his concern about conviction rates. The Attorney General said in his second memo to prosecutors, "Preliminary figures I have obtained from the court system indicate that the percentage of guilty pleas or convictions on felonies filed in some areas of the state is

⁴⁵ The Attorney General's purposes in promulgating his policy were to restore public confidence in the justice system; establish a system in which people could be fairly charged, tried and sentenced; and to improve the trial skills of the prosecutors. See Appendix A for the Attorney General's memos in which some of these purposes are articulated.

⁴⁶ Figures 1 and 2 and the other tables throughout this report include only cases in which a felony was referred to the prosecutor and a final disposition (e.g., screened out, dismissed, plea of guilty, etc.) was recorded in PROMIS. All open cases were excluded from the analysis. About 7% of the 1987 cases were excluded because they were still open at the time the data were compiled.

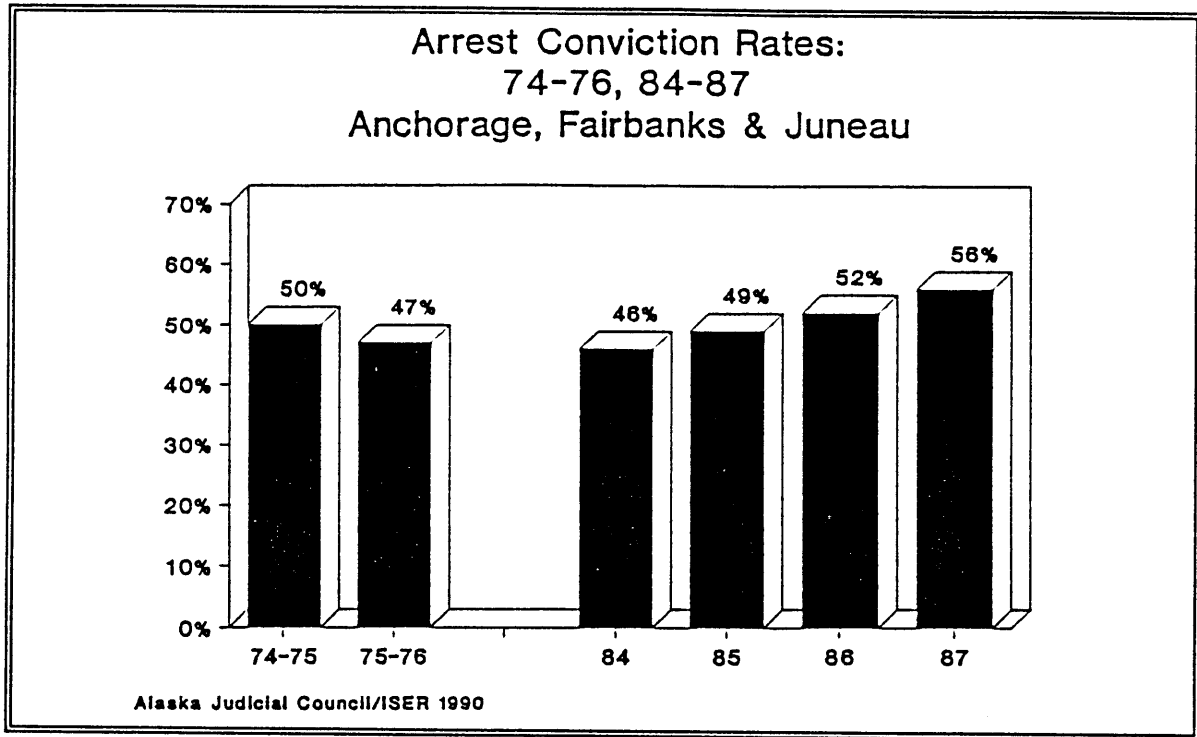


FIGURE 1

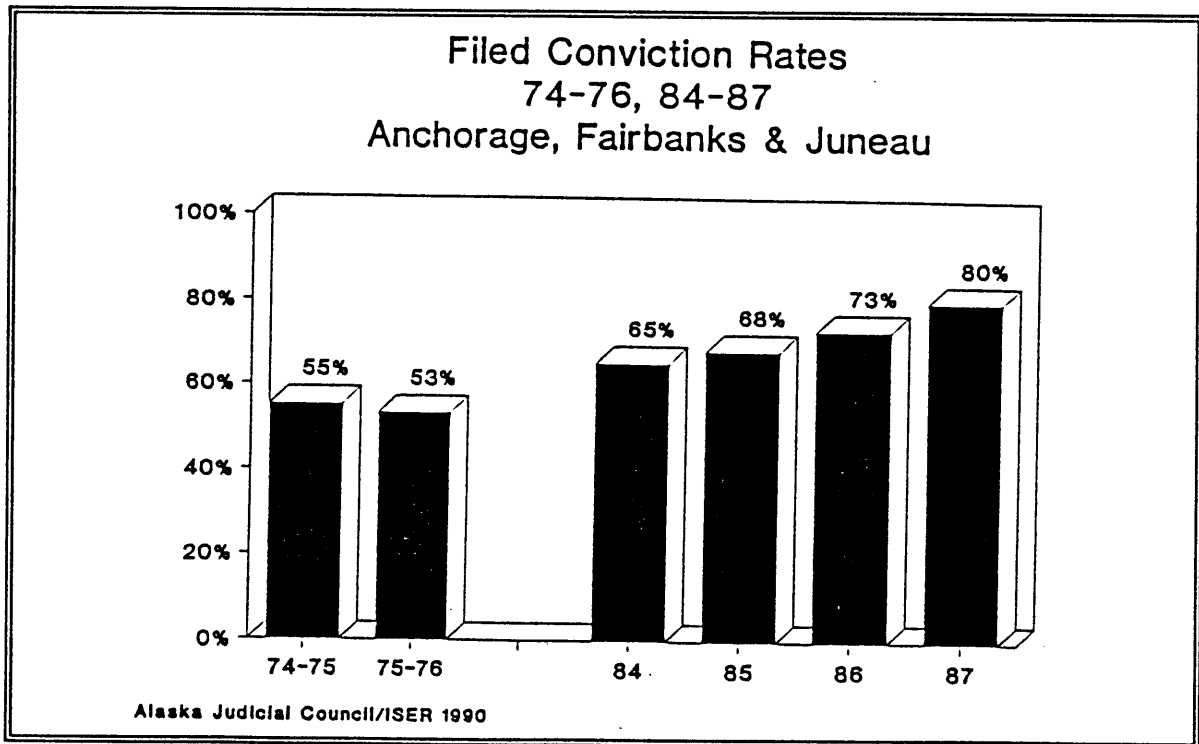


FIGURE 2

extremely low. In one judicial district it is less than 60 percent."⁴⁷ A few paragraphs later, he tempered his apparent concern by saying, "Merely having a conviction statistic proves nothing....We should be seeking a result justified by the offense and not simply obtaining convictions with meaningless penalties."

In a later discussion of his policy, Attorney General Gross reiterated his interest in conviction rates:

The major concern I had after I was appointed Attorney General was the general level of performance of prosecutors' offices. There were lots of lag times, the conviction rates were appalling, especially in one office.⁴⁸

Arrest⁴⁹ conviction rates show what proportion of all charges referred to the prosecutor were convicted. Filed conviction rates generally show the outcomes for charges filed by prosecutors in court and take into account the effects of prosecutorial screening. The conviction rate using all arrested or referred cases as the basis showed considerably less change between 1974 and 1987 than did the conviction rate that was calculated using only filed⁵⁰ cases as a basis. The arrest conviction rate dropped slightly (from 50% to 47%) immediately after the ban, apparently as a result of the slightly increased number of cases screened out.

The arrest conviction rate was 46% in 1984, nearly identical with the 1975-76 rate of 47%, although the patterns of case processing had changed substantially. Nearly three times as many cases were screened out in 1984 as in 1975-76 (31%, compared to 11%).

⁴⁷ Memorandum from Attorney General Avrum Gross to All District Attorneys, at 2 (July 24, 1975).

⁴⁸ ALASKA BANS PLEA BARGAINING, supra note 8, at 15.

⁴⁹ The term "arrest" includes all cases referred to prosecutors by police for a charging decision. In some of the referred cases, no defendant had been arrested. The term also includes any charges developed by the prosecutor prior to the time such charges were filed in court.

⁵⁰ Filed cases included those originally arrested or referred for a felony whose case was filed in court as a misdemeanor, as well as felonies that remained felonies at filing.

However, only about half as many cases were dismissed after filing (22% in 1984; 40% in 1975-76). Thus, although the arrest conviction rate was virtually unchanged, the filed conviction rate was much higher (65% in 1984, compared to 53% in 1975-76). This suggests that prosecutors were operating more effectively, by filing fewer cases that would ultimately end in dismissal.

Both arrest and filed conviction rates improved between 1984 and 1987. The change appeared to stem from an increase of guilty and nolo contendere pleas, and a concomitant drop in dismissals. Screening, trial convictions and acquittals all remained about the same. The biggest change for dismissals and pleas to reduced charges came between 1986 and 1987; pleas to the original charge had taken the jump from 23% to 26% between 1985 and 1986. As a result of these changes, the filed conviction rate was at 80% in 1987, while the arrest conviction rate was 56%.

The overall figures masked slightly different patterns in specific communities. Anchorage dispositions showed a decrease in screening and in dismissals, with increases in both pleas to original and to reduced charges. Fairbanks dismissals also dropped, but screening actually increased. Pleas to reduced charge(s), which were already a low percentage of dispositions, dropped slightly. In Anchorage, the percentage of pleas to the original charge increased slightly, from 21% to 25% of filed cases. In Fairbanks, the percentage of pleas to the original charge was also 21% in 1984, but increased by over half, to 33% of all filed cases in 1987.

One of the most interesting comparisons between the two communities was the filed trial rate. In the 1970s, Fairbanks was a very adversarial community. Before the ban, 13% of Fairbanks dispositions were by trial; following the ban, trials rose to 17%. Only 4% of Anchorage pre-ban dispositions were by trial, and 7% of post-ban dispositions. In the 1980s, however, the Fairbanks trial rate was consistently very slightly less than the Anchorage rate. In both communities, screening had increased, in Fairbanks more than in Anchorage. This may have resulted in stronger cases for the prosecutor and less incentive for defendants to take a chance on a trial.

The two communities also differed in their conviction rates. Prior to the ban, the Fairbanks conviction rates, based on either arrests or filed cases, exceeded the Anchorage conviction rates. Immediately after the ban, both Fairbanks rates improved. In 1984, however, the Anchorage rates were considerably higher than the Fairbanks rates. Convictions of filed cases had improved in Fairbanks by 1987; in fact the filed conviction rate then was slightly higher than the Anchorage rate. But arrest conviction rates in Fairbanks remained below 50% in 1987, in contrast to Anchorage's 63% arrest conviction rate.

The case summary information in Tables 1, 2, and 3 and the conviction rates shown in Figures 1 and 2, suggest that the improved conviction rates may be due partially to increasing charge bargaining after 1985. The increased bargaining, in turn, may have been related to personnel changes in the Attorney General's office. The Attorney General and his staff changed in mid-1985. Harold M. Brown became Attorney General and Dan Hickey, who had been responsible for administration of the plea bargaining policy since its inception, left the Attorney General's office. In December of 1986, Governor Cowper took office and appointed Grace Berg Schaible as his Attorney General. Both Mr. Brown and Ms. Schaible had to respond to the economic restrictions imposed by declining state revenues. Mr. Brown commented in 1990 about the changes, emphasizing the economic factors:

While I was Attorney General, the department's policy prohibiting plea bargaining came under review...because the value of a barrel of oil had dropped from approximately the mid-20s [dollars] to as low as 9+ dollars and the department [of law] had been ordered by the Governor to reduce by 10% its operational budget...for that year. Second, I was not personally a great believer in "the ban" and felt that the combination of the ban and presumptive sentencing had contributed significantly to increased costs of the justice system without concomitant benefits to society.

The increase in charge bargaining was attributed by other attorneys primarily to the change in personnel:

<p>TABLE 1</p> <p>OUTCOME OF CASES REFERRED FOR PROSECUTION AS FELONIES AND COMPLETED</p> <p>Number of Cases and Percentage Distributions</p> <p>Anchorage, Fairbanks and Juneau</p>												
	1974-1975		1975-1976		1984		1985		1986		1987	
	N	%	N	%	N	%	N	%	N	%	N	%
All Charges Screened Out	94	8%	125	11%	630	31%	536	29%	535	30%	497	30%
All Charges Dismissed	449	39%	452	40%	443	22%	395	21%	314	18%	208	13%
Plea to Reduced Charge	271	24%	203	18%	385	19%	349	19%	356	20%	406	24%
Plea to Original Charge	254	22%	254	22%	439	23%	433	23%	465	26%	439	26%
Trial Conviction	44	4%	77	7%	122	6%	130	7%	105	6%	95	6%
Trial Acquittal	31	3%	29	3%	21	1%	25	1%	19	1%	20	1%
	1,143	100%	1,140	100%	2,040	100%	1,868	100%	1,794	100%	1,665	100%
Conviction Rate Per 100 Cases Referred and Completed*	50%		47%		46%		49%		52%		56%	
Conviction Rate Per 100 Cases Filed and Completed*	55%		53%		65%		68%		74%		80%	

* Cases open because of an outstanding warrant or for other reasons were not included in the database.

Alaska Judicial Council
Plea Bargaining Re-Evaluation, 1991

TABLE 2

**SUMMARY OF CASE OUTCOMES OF CASES REFERRED FOR PROSECUTION
AS FELONIES AND COMPLETED**
Number of Cases and Percentage Distributions
Anchorage

	1974-1975		1975-1976		1984		1985		1986		1987	
	N	%	N	%	N	%	N	%	N	%	N	%
All Charges Screened	75	10%	87	12%	321	28%	289	25%	243	23%	236	23%
All Charges Dismissed	301	42%	329	46%	232	20%	242	21%	207	19%	137	14%
Plea w/Charge Reduced	169	23%	101	14%	274	24%	257	22%	277	26%	313	31%
Plea, Charge Stands	151	21%	156	22%	241	21%	284	24%	279	26%	253	25%
Trial Conviction	16	2%	32	5%	81	7%	88	8%	63	6%	66	7%
Trial Acquittal	11	2%	14	2%	14	1%	12	1%	12	1%	13	1%
Conviction Rate Per 100 Cases Referred and Completed*	723	100%	719	100%	1,163	100%	1,172	100%	1,081	100%	1,018	100%
		46%		41%		52%		54%		58%		63%
Conviction Rate Per 100 Cases Filed and Completed*		52%		46%		71%		71%		74%		81%

* Cases open because of an outstanding warrant or for other reasons were not included in the database.

Alaska Judicial Council
Plea Bargaining Re-Evaluation, 1991

TABLE 3

**SUMMARY OF CASE OUTCOMES OF CASES REFERRED FOR PROSECUTION
AS FELONIES AND COMPLETED
Number of Cases and Percentage Distributions
Fairbanks**

	1974-1975		1975-1976		1984		1985		1986		1987	
	N	%	N	%	N	%	N	%	N	%	N	%
All Charges Screened	12	4%	27	8%	255	40%	203	39%	195	39%	197	44%
All Charges Dismissed	114	34%	88	26%	144	22%	103	20%	75	15%	37	8%
Plea w/Charge Reduced	81	25%	85	25%	72	11%	61	12%	46	9%	37	8%
Plea, Charge Stands	80	24%	80	24%	133	21%	109	21%	139	28%	148	33%
Trial Conviction	27	8%	44	13%	32	5%	36	7%	37	7%	24	5%
Trial Acquittal	17	5%	14	4%	6	1%	10	2%	6	1%	6	1%
Conviction Rate Per 100 Cases Referred and Completed*	331	100%	338	100%	642	100%	522	100%	498	100%	449	100%
Conviction Rate Per 100 Cases Filed and Completed*		57%		62%		37%		40%		44%		46%
		59%		67%		61%		65%		73%		83%

* Cases open because of an outstanding warrant or for other reasons were not included in the database.

Alaska Judicial Council
Plea Bargaining Re-Evaluation, 1991

The long-term effect [of the change in Attorney Generals] has been to result in more charge bargains over the past few years. (Former Anchorage prosecutor)

Whatever caused the increased amount of charge bargaining in the mid-1980s, these tables also emphasize the fact that more offenders were convicted than had been in earlier years. In Anchorage, this was true for both types of conviction rates. In Fairbanks, however, only filed conviction rates substantially improved. The most noticeable difference between the two communities that might account for this variance was that the Anchorage screening rate was 28% in 1984 and dropped to 23% by 1987, while the Fairbanks screening rate was 40% in 1984 and rose to 44% by 1987.

The variations in conviction rates emphasize the crucial role played by the screening portion of the Attorney General's policy. The next section describes the implementation of this part of the policy and its effects and effectiveness in different parts of the state.

B. Screening of Cases

Then-Attorney General Gross saw screening of cases as the key to making his initial prohibition of plea bargaining work. In his second memo to prosecutors elaborating the details of his policy (July 24, 1975), he said:

Some charges should not be filed at all. Merely because you are brought a police file does not mean that you are required to file a criminal charge. In some cases the facts simply will not justify criminal prosecution either because it is not warranted in the interest of justice or because technically we could not prove the charge.

The term "screening" can connote a wide range of prosecutorial activities, from refusal to file a charge, to plea negotiations at any stage of the case. In Attorney General Gross's original memoranda describing his policy, screening referred to the prosecutors' review of charges brought by the police prior to the filing of any charges in court. That

definition of screening is used for purposes of this report. In practice, however, many attorneys identified all pre-indictment review by prosecutors as screening. Pre-indictment (but post-filing) screening will be discussed below, under Section C, Charge Reductions and Dismissals.

1. Overview of Screening

The changes brought about by more rigorous screening were among the most significant and long-lasting effects of the ban. Prior to the ban, only about 8% of the arrested cases brought by the police were screened out (Figure 3, Table 4). During the first year after the ban, a small but significant increase occurred, to an 11% screening rate. Attorneys and police interviewed agreed that the increase was bought at a high

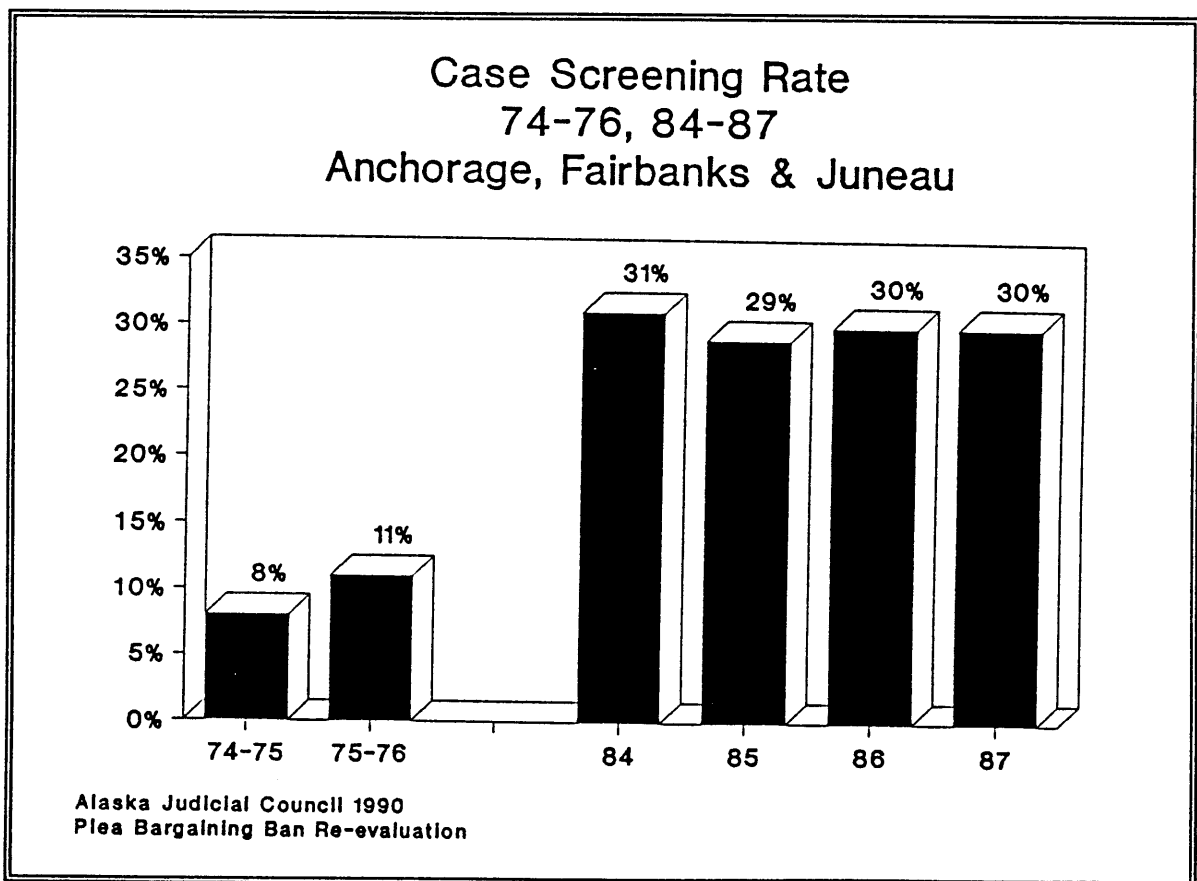


FIGURE 3

price. Because police had customarily perceived themselves as making the charging decision, the Attorney General's policy of claiming this function for prosecutors left police angry. They were concerned that criminals were not being prosecuted and that victims were not receiving redress. In the longer run, however, police opinion grew more positive. A veteran police officer described the effects of the policy on the Anchorage Police Department in the first years following the ban:

Prior to 1975, the quality of work was very sloppy, and there's no comparison with the way things are done now. It used to be comparatively like the stone age and you seldom went to court. After 1975, it was a tough two years in the relationship between the police and the district attorney. It [the policy] forced us to go back and become good investigators technically, forensically, scientifically, with knowledge of law and procedures. It probably raised the quality of police work four or five times....The better we got, the more cases we began to make. No matter how tight the screening attorney would tighten the funnel the better we became, and interestingly the more cases we made. We were very fortunate to have the money to get the proper training...we were also able to get the best equipment available.

A former Anchorage prosecutor commented on the adjustments made by the police in the late 1970s to the new screening policy:

The screening program was under my supervision....If the charge was dropped it was a screening decision not as a quid pro quo for a plea from the defendant. The police had a process they called 'Dial a dismissal.' They would call on the phone and give the screening attorney the bare facts--perhaps slanted a little--and he would dismiss the case over the phone. Then the police wouldn't have to go to all the effort to make the good case.

TABLE 4
SCREENED-OUT CASE
BY TYPE OF OFFENSE AND LOCATION
Percentage Distributions, All Offenses

	1974- 1975	1975- 1976	1984	1985	1986	1987
Anchorage/Fairbanks/ Juneau	8%	11%	31%	29%	30%	30%
Statewide			31%	32%	33%	32%
Anchorage	10%	12%	28%	25%	23%	23%
Fairbanks	4%	8%	40%	39%	39%	44%
Southeast			24%	25%	33%	29%
Southcentral/SW			28%	35%	35%	36%
Bush			36%	41%	43%	34%
Anchorage/Fairbanks/ Juneau	8%	11%	31%	29%	30%	30%
Violent	8%	10%	30%	28%	26%	27%
Property	7%	10%	31%	26%	29%	30%
Sexual	9%	10%	42%	44%	48%	47%
Drugs	11%	15%	25%	21%	24%	20%
Anchorage	10%	12%	28%	25%	23%	23%
Violent	10%	11%	25%	24%	20%	23%
Property	8%	10%	25%	21%	21%	23%
Sexual	13%	15%	42%	49%	42%	41%
Drugs	15%	17%	26%	17%	18%	11%
Fairbanks	4%	8%	40%	39%	39%	44%
Violent	4%	7%	40%	41%	37%	38%
Property	4%	10%	40%	34%	41%	43%
Sexual	0%	0%	43%	46%	53%	56%
Drugs	4%	2%	37%	32%	28%	44%
Southeast			24%	25%	33%	29%
Violent			22%	20%	27%	32%
Property			28%	27%	31%	29%
Sexual			37%	35%	46%	39%
Drugs			13%	12%	24%	16%
Southcentral/SW			28%	35%	35%	36%
Violent			30%	31%	33%	34%
Property			26%	32%	38%	36%
Sexual			40%	49%	41%	59%
Drugs			18%	34%	21%	21%
Bush			36%	41%	43%	34%
Violent			33%	31%	33%	26%
Property			38%	41%	49%	32%
Sexual			44%	49%	52%	49%
Drugs			30%	47%	22%	23%

2. Statistical Evidence

The data for the 1980s showed a screening rate of about 30% (see Table 4) for Anchorage, Fairbanks and Juneau. These data were not entirely comparable to the earlier data because the 1980s database included cases that were referred to the prosecutor prior to an arrest, while the 1970s database included only cases in which an arrest had been confirmed. However, limiting the 1980s database to only cases in which an arrest was confirmed would not necessarily make the two databases more comparable. As both police officers and attorneys testified, police work improved greatly after the middle 1970s and the quality of most police cases was much higher. To the extent that the 1980s cases were stronger, none of the data were entirely comparable between the two time periods.

Attorneys and police officers agreed that one change brought about by the ban was greater readiness on the part of the police to discuss their cases with prosecutors prior to filing charges rather than first making arrests. A case in which a police officer in 1975 would have made an arrest and filed a charge might well, in 1985, have resulted in discussion with the prosecutor followed by additional investigation and possibly dismissal. The interviews described significantly greater screening in the mid- and late-1980s than in the 1970s, supporting the higher screening rates found in the statistical analyses.

The statistical evidence supported the interview finding that the new, vigorous case screening together with its ramifications for improved police work was one of the most effective aspects of the no plea-bargaining policy. This was most true in Anchorage and Fairbanks where the district attorneys' offices were large enough to permit one or a handful of attorneys to screen most felonies. It was somewhat less applicable to smaller offices where the combination of fewer attorneys and more cases coming from villages gave the police more opportunity to exercise their traditional prerogative of deciding the criminal charges. However, the statistical evidence showed an effect on screening even in rural Alaska.

3. Screening Standards

In 1980, the Attorney General's office set out formal guidelines for disposition of cases. The guidelines covered prosecutors' ethical responsibilities, screening, charging practices, and charge and sentence negotiations. The standard for screening followed the policy that had been in effect since the ban -- a "beyond a reasonable doubt" guideline.

D. Criminal Division Screening Policy

Charges shall be initiated only if at the time of filing, a case presented for prosecution contains, on its face, sufficient legally admissible evidence to warrant a trier of fact to conclude that the defendant committed the offense charged beyond a reasonable doubt. If the original charge referred cannot be proven beyond a reasonable doubt, but there is another charge which can be proven, then the alternate charge will be the only charge filed.⁵¹

Screening practices varied by district attorney's office as did other parts of the plea bargaining policy. In Anchorage, an intake office reviewed each case, while in Fairbanks most final decisions were made by the head of the office. In rural areas where weather, distance and lack of transportation between villages often limited access to justice agencies, little screening of police charges was done prior to filing. Police and Troopers continued to file charges without consulting with the prosecutor because defendants had to be arraigned within 24 hours of arrest.⁵² In those communities, prosecutorial review of the case occurred after arrest, and often might be postponed until after indictment.

a. Anchorage. Screening in Anchorage was dominated by the head of the intake section who had been screening cases since 1975. He recalled the intake practices prior to the ban:

⁵¹ 1980 STANDARDS, supra note 1, at 9.

⁵² ALASKA R. CRIM. P. 5(a).

[A] police officer would arrive at the door and announce that he had an in-custody case, and the secretary would ask for help doing the complaint, or arrest or search warrant. The new kid, or most junior D.A. would be assigned to help and naturally with that attitude, everything was charged and later negotiated....At some point there was an audit done of our office management. This was done, I think, in early 1975. One of the findings was the lack of screening and they recommended the institution of [a] formal structured intake system....

In a separate interview the same attorney elaborated on screening practices before and immediately after the ban:

Difficult to say [how many cases were referred to prosecutors before arrest]. Cops would call their favorite DA and discuss cases informally. There weren't any standards, no records were kept, no consistency at all among DAs.

After 1975 when intake was set up...we wanted to make an impression on the police. We declined at least a third of the cases, probably more like 40%. It's less now.

A former chief of police corroborated the informal nature of pre-ban screening:

An officer would call up his favorite prosecutor and tell him about the case. He'd say, 'This looks like a fatal error to me--what do you think?' Then the DA would tell him not to file, or to pursue it. Because some cases got dumped by the prosecutors without any record, there isn't as much difference between screening now and practices back around the time of the ban as the numbers might make it seem.

After the ban, the prosecutors established a standard of "beyond a reasonable doubt." Also they set criteria for taking cases. In small drug cases, for example, you had to have an eyewitness. A lot of cases got thrown away.

After the ban, we had a policy of discussing the case with the DA if possible. We would still make an arrest if the crime was in progress, or if we thought the defendant was dangerous, or if it was close in time to the crime and we

thought the investigation would be helped by an arrest. Otherwise we would sit down with the DA and talk it over.

The term "screening" came to encompass all pre-indictment activity in Anchorage, and to cover case discussions with defense attorneys as well as unilateral decisions about a case by the prosecutor. Most persons interviewed, including prosecutors, agreed that Anchorage pre-indictment screening involved significant amounts of charge bargaining, despite the official prohibition of plea negotiations. It was defended as a necessary means of conserving system resources, despite the fact that it had been established as an institution at least since the early 1980s, well before the state's revenue losses of the mid-1980s. At the time of this report, screening in Anchorage was defined by the prosecutors as including both the intake activities of the prosecutor's office prior to filing charges and the prosecutors' review of cases during the post-filing/pre-indictment period. The district attorney described the process:

The law enforcement agency brings in the cases and discusses felonies in person with the DA. The head intake attorney assigns the case to an attorney in his section to make a decision on what charges to file. ... [U]ltimately, he maintains control of all cases. Typically they go across his desk then mine for final review. If the case is accepted, it is assigned.

Police, public defense attorneys and most judges perceived the present Anchorage system as a good one. A police officer commented about the effects of the intensified screening:

Overcharging or multiple charging by police stopped. Officers got the message that they could no longer send over the 'barking dogs' because unless the case was good it wasn't going to be prosecuted. One definite side effect of the ban was increased professionalism.

A former prosecutor elaborated on the current screening process:

He [the intake attorney] has a 'fixit' list. He got those guys in from the Anchorage Police Department, who were pretty professional policemen, and he would send them out with a list of twenty or thirty things that he would want done on a case before he would accept it. One of them wrote a humorous letter to the Bar Rag one time and referred to the 'fixit' list as being like the one they had for Hiroshima after the Enola Gay flew over.

Attorneys for the state's Public Defender agency who worked closely with the pre-indictment screening process also spoke favorably of it:

A small team of people headed by [the chief intake attorney] screen cases and have an enormous amount of power to deal cases. [The chief intake attorney] makes all the final decisions. Most of his bargaining reflects his assessment of the strength of the case.

Everything goes through [the chief intake attorney]....He does an excellent job screening cases. He meets with the police and the public defender.

It [screening] is all done by intake....They have guidelines which are closely adhered to and they do a good job.

Private defense attorneys, however, were less familiar with the workings of the intake process. Some professed themselves mystified; others complained:

The higher the profile of the cases, the less good judgment is used concerning the bargaining process to the point that unconstitutional decisions are made, which is not unique to Alaska.

This dissatisfaction may be explained by the fact that the private attorneys may have had fewer dealings with the intake unit than did the public defense attorneys. As one private attorney noted, the private attorneys tended to get more serious cases. A former prosecutor commented that the private defense bar did not "do small cases. They have specialties--drugs, murder, and so forth." It often appeared that they had entered

the case later in the process than the public attorneys, who typically were participants from shortly after the time of the defendant's first appearance in court.

An Anchorage judge who had been a prosecutor thought that screening standards had changed in recent years:

It used to be that cases were only taken for prosecution if they could be proved beyond a reasonable doubt. Now, I think, the DA's office has been accepting cases for prosecution, both felonies and misdemeanors, with weaker evidence with the view to charge bargain the cases later. It used to be the case that was charged was the case that went to trial....They will accept a case that appears to be provable, but more investigation is needed.

The judge's perceptions were not corroborated by other interviews, but the data (see Table 4, above) showed a slight decline in cases screened out, from 28% of all charges referred in 1984, to 23% of all charges referred in 1987. The decline in screening out was most noticeable in drug cases, where the number screened out dropped from 26% of referred cases in 1984 to 11% of referred cases in 1987. More property and violent cases were accepted after 1984 also, although the change was not as pronounced as that for drug offenses.

b. Fairbanks. The head of the Fairbanks office exerted close control over the screening of felony cases. Although the actual screening was done by an assistant district attorney, the district attorney himself made the final decision on which cases to accept and on what the charge would be. The screening attorney described the process:

I receive the police report; if the defendant is incarcerated, [I] will screen the case quickly, ascertaining a probable cause decision. If no one has been arrested yet, we will weigh the case more carefully. The standard of proof used is whether or not you can convince a jury beyond a reasonable doubt that the defendant is guilty.

The Fairbanks screening rates were the highest in the state in 1984 (40%) and in 1987 (44%). They were second only to screening rates in the Bush in 1985 and 1986. The public defense attorneys perceived a set screening policy and could identify the people responsible for screening of various types of cases. Police and private defense attorneys did not see as much organization. One long-time police officer commented:

When I started [April, 1975] cases were plea bargained on a wide open basis. After the ban things changed. It was more restrictive in that we had to charge them with everything for fear that they would dismiss most away. There was more multiple charging than before.... Screening standards change with the wind. It depends on who is being charged and what their case load is. It's hard to understand what their thinking is. But it definitely seems to depend on what their resources are at the particular time.

An assistant district attorney also emphasized the role of resources and other factors in screening, considerations that were not placed as prominently by attorneys in Anchorage:

We look at a lot of factors: was the crime committed, and did this guy do it? Is it provable...beyond a reasonable doubt? Look at the subjective aspect of the case: is it worth the time and money to convict this case? Pick the case you will be most effective on. Look at the mitigators: if it gets watered down too much, do we want to bother the system?

Fairbanks screening practices, although adhering to the same standard of "proof beyond a reasonable doubt," resulted in fewer cases being accepted for prosecution than in Anchorage. This suggests either more rigorous consideration of cases, or application of other criteria for screening, or both. It also could suggest that police cases were not prepared as well as in Anchorage. However, none of the interviewees suggested that as a possibility. The fact that filed conviction rates for Fairbanks were similar to those found in Anchorage, despite the much higher Fairbanks screening rate, suggests that other criteria (e.g., available resources, "bother to the system") may have played a larger part in Fairbanks screening.

c. Other Locations. Table 4 shows the screening rates by year for each of the locations studied. Anchorage, at 23% to 28%, had the lowest screening rates in the state, closely followed by Southeast (24% to 29%). Fairbanks and the Bush communities declined the highest number of cases for prosecution (Fairbanks, 40% to 44%; Bush communities, 36% to 43%). The Southcentral communities of Kenai, Kodiak, Palmer and Valdez together had screening rates varying from 28% to 36%.

In places other than Anchorage and Fairbanks, "screening" was understood to mean the prosecutor's opportunity to review the charges brought by police and to decide what charge(s) the prosecutor wanted to file. Although many prosecutors, even in the most rural areas, used the "beyond a reasonable doubt" standard set by the Attorney General's office for screening, it often was not applied until after the case had been filed in court. At times, it was not applied until after indictment, but this was still considered screening if the prosecutor felt that it was the first opportunity to assess the case strength, need for prosecution and resources.

Interviews suggested that outside of Anchorage and Fairbanks, district attorneys gave their assistants more responsibility for case screening, or that the police retained more of the charging function. In Juneau, each prosecutor spent a week at a time on intake screening cases; all the cases screened by that prosecutor were then tried by the same person. The prosecutor in Fairbanks who was responsible for screening Barrow cases commented:

The police may file a complaint without running it by the DA if the DA is not available. More cases are filed as felonies by the police before the DA screens them, but are screened by the DA before being presented to the grand jury.

In Kotzebue, the assistant district attorney responsible for the area noted that police and witness cooperation structured the screening process:

The police report is received and follow-up investigation is completed. If a case occurs in Kotzebue, I will get the report

in a timely fashion; if it is from the village, sometimes it will take a month to get the report, and sometimes longer. I make a determination what the charges should be if I am going to go forward with it. I take the case to grand jury. [I am] aiming for the disposition of the case in a manner which is in the public interest, and commensurate with the seriousness of the offense.

I don't have as tight a screening policy as I would like. This district includes a lot of villages. There has been a relaxation of screening. For example, an assault will occur in the village. The people will want the defendant out of the village, then the villagers will come back and ask that the state not prosecute. I have difficulty with cooperation of the witnesses. [I] do not have the resources available that you do in Anchorage.

The lack of differences in screening rates between the smaller and larger communities, despite the many variations in demographics, culture and economics, may mean that the statewide policy strongly influenced local decisions. Attorneys in diverse areas provided support for this hypothesis, indicating in their interviews that the "beyond a reasonable doubt" standard was applied in many places:

Case screening practices must be pretty thorough because the police complain a lot, which is a sign they are screening their cases. (Bethel defense attorney)

Case screening is better than it used to be....They have seasoned attorneys who do a fair job. The standard is consistent with the ABA standards, proof beyond a reasonable doubt before a jury. (Juneau defense attorney)

4. Summary

Screening and "open sentencing" (at which no binding recommendations have been made), which represented the antithesis of the bargained sentences that formerly characterized the justice system, were two of the strongest legacies of the ban on plea bargaining. Both were successful efforts to clarify the roles of the players in the criminal justice system--police should investigate, prosecutors should charge and convict, judges

should sentence—which was one of the Attorney General’s major purposes in instituting the policy. Charge reductions and dismissals, however, as the next section indicates, were far more difficult to manage, in part because they were to some extent the essence of the prosecutor’s realm.

C. Charge Reductions and Dismissals

...[C]harge what you can prove and then do not deviate from it unless subsequent facts convince you that you were erroneous in your initial conclusion. (Attorney General’s memo to prosecutors, July 24, 1975)⁵³

Separating reductions and dismissals of filed charges from the pre-charging screening process creates a slightly artificial distinction. In practice, the activities are virtually inseparably intertwined in most cases. However, analyzing the activities separately allows a more careful analysis of each part of the process, and is of value in understanding the ways in which the ban has evolved and changed in the past fifteen years.

1. Historical Development of the Current Policy

Attorney General Gross recognized the difficulties of trying to distinguish between legitimate charge reductions or dismissals and those that violated the spirit of his policy. In retrospect, it was relatively easy to change the sentence bargaining practices that had been the standard means of case disposition because the sentence recommendation was an objectively verifiable action by the prosecutor. Implementing rigorous screening standards was more demanding, but was accomplished within a few

⁵³ Memorandum from Attorney General Gross, supra note 47, at 4.

years. Prohibiting charge bargaining however, appears to have been an overly idealistic goal in the long run (Table 5).⁵⁴

Immediately after the ban, charge bargaining appeared to decline substantially in most parts of the state. The exceptions were the rural areas, where most attorneys viewed charge negotiations as essential to the disposition of cases, and Fairbanks. In Fairbanks, charge reductions and dismissals appeared to increase. The district attorney in Fairbanks confirmed, in a 1989 interview, that his local policy that prohibited plea bargaining did not prohibit the filing of multiple charges that could be dismissed later under appropriate circumstances. Because he took office only six months before the ban, the 1975-76 increase may reflect his own local policies as much as response to the statewide ban:

We probably have more multiple-count cases than any other part of the state. It's a strategy for going to trial. You're better off going to trial with as many charges as possible. But at sentencing, it doesn't matter much. That hasn't changed much since 1976.⁵⁵

Interviewed in 1978 for the earlier evaluation of the ban on plea bargaining, a Fairbanks public defense attorney perceived a very similar practice:

⁵⁴ Table 5 shows the percentage of filed cases in which the final disposition of the case was a guilty or nolo contendere plea associated with a charge reduction, dismissal of one or more (but not all) charges, or with both. Defining the variable in this manner permits analysis of all cases in which a charge bargain might have occurred. The interviews suggested that not all reductions and dismissals were the results of bargains or discussion. The table therefore represents the maximum possible percentage of charge bargained cases. Only cases for Anchorage, Fairbanks and Juneau are shown to allow comparison with data from the earlier study.

⁵⁵ A comparison of the charges filed per case in Anchorage, Fairbanks and Juneau for the pre- and post-ban years showed an average of 1.0 charges per case in 1974-75 and 1.9 charges per case in 1975-76. These data suggest an increase in the practice of filing multiple charges. The rate in 1984, however, was down to 1.1 charges per case. By 1986, it had risen to 1.4 charges per case and the rate remained at that level in 1987.

TABLE 5 INCIDENCE OF PLEAS WITH REDUCTION OR DISMISSAL OF ONE OR MORE CHARGES Anchorage, Fairbanks, Juneau Combined*						
Offense	1974- 1975	1975- 1976	1984	1985	1986	1987
All Offenses	35%	30%	37%	38%	40%	48%
All Violent	33%	31%	46%	44%	46%	60%
Robbery I	32%	32%	37%	10%	36%	50%
Assault II & III	34%	30%	52%	52%	51%	59%
All Property	37%	34%	34%	36%	38%	45%
Burglary I	42%	35%	46%	46%	48%	64%
Burglary II	39%	23%	38%	33%	43%	41%
Theft II	35%	39%	27%	22%	31%	33%
Crim. Mischief II	27%	8%	39%	59%	27%	53%
Forgery II	50%	40%	20%	35%	42%	40%
All Sexual	33%	21%	42%	41%	50%	46%
Sex Assault I	28%	13%	37%	40%	58%	37%
Sex Abuse I	43%	21%	51%	51%	62%	60%
Sex Abuse II	[0%]	[33%]	47%	28%	34%	40%
All Drugs	37%	22%	29%	35%	36%	42%
Drugs II & III	38%	23%	31%	34%	35%	41%

- * This table shows the percentages of all filed cases in which a plea of guilty or nolo contendere was entered and in which a charge reduction or dismissal occurred at any time during the case processing between referral to the prosecutor and final disposition. It does not include cases in which all charges were declined for prosecution.

Alaska Judicial Council
Plea Bargaining Re-Evaluation, 1991

They tend to stack their charges. Let's say the charge is forgery and there are ten checks involved. They would charge each of the ten as separate counts and then offer to dismiss a couple, or half or whatever....If they are alleging a guy engages in forgery, it doesn't make any difference to them whether he pleads to each of the ten counts. He could plead to seven of them and they'll mention all ten at sentencing.⁵⁶

The district attorney emphasized that dismissal of the charges was done unilaterally by the district attorney's office and not in consultation with the defendant's attorney. Under those circumstances, it could not be called a "bargain." However, defense attorneys perceived themselves to be in a position to encourage such unilateral decisions. An assistant public defender said in one of the 1978 interviews:

To get them to do these unilateral modifications you have to put a lot of pressure on them. You have to keep showing them weaknesses in their case. But it's not a deal in the sense of, 'If you reduce the charges, then I'll plead.' But a reasonable person would probably see that a plea would arise in light of the reduction.⁵⁷

Whether or not the charge changes were influenced by the defense attorneys' contributions, Attorney General Gross clearly did not approve of the practice of unilateral reductions and dismissals any more than he approved of actual charge bargaining. He issued a third memorandum a year after the ban went into effect, addressing the issue of charge reductions and dismissals:

When we implemented the original policy, I stated that I wanted charges which were initially filed to accurately reflect the level of available proof at that time and that I did not want overcharging, either in terms of the number of counts or the magnitude of the charge. I realize that to some degree it is inevitable that there may be reductions of charges or

⁵⁶ ALASKA BANS PLEA BARGAINING, supra note 8, at 59.

⁵⁷ Id. at 69.

dismissals of charges once a defendant determines to enter a plea....Some District Attorneys remarked to me...that they were bringing multiple charges and multiple counts as a matter of "tactics." ... I do not want you to set up a charge bargaining situation by the way the initial charges are filed. Charges should be dismissed or decreased only under unusual circumstances, only then when justified by the facts in a case, and not as a quid pro quo for the entry of a plea of guilty....

I think over the years much of charging has become linked with the techniques of plea bargaining, to the point where filing the appropriate initial charge for an offense is not gauged in terms of what would be appropriate for conviction, but rather what would be appropriate for bargaining purposes. If we are not going to bargain, that should not be a relevant consideration. (emphasis in the original)⁵⁸

In response to the Attorney General's memorandum, it was apparent from the 1978 interviews that the Fairbanks district attorney office practices tightened up, at least for a time. A Fairbanks defense attorney said in 1978:

A couple of years ago, if there were two counts and the defense attorney said to you, 'I'll plead to one,' you could use that as an incentive to drop the other. If as a defense attorney you now go to the D.A. and say, 'I'll plead to one of your two counts,' that's the kiss of death. It's taboo to say that. They get more self-righteous than ever, and feel that they can't dismiss the other count because it would look like a plea bargain. (emphasis in original)⁵⁹

The policy was never as tightly enforced in the rest of the state as it was in Fairbanks. By 1980 when the new criminal code and presumptive sentencing went into effect, trial rates had started to drop and a less rigid attitude towards charging prevailed. The new approach was embodied in the formal guidelines for prosecutors that were promulgated in June of 1980. Even the title of the guidelines, Standards Applicable to

⁵⁸ Memorandum from Attorney General Gross, June 30, 1976 memo at 2. See Appendix A infra.

⁵⁹ ALASKA BANS PLEA BARGAINING, supra note 8, at 66.

Case Screening and Plea Negotiations, suggested that negotiation was an acceptable practice, despite the clear statement in the guidelines prohibiting concessions on charges:

...prosecuting attorneys will not enter into any agreement or understanding with a defendant or his attorney that is designed to lead to the entry of a plea of guilty ... that in any way involves a concession with respect to the charge to be filed or which involves an agreement to dismiss or reduce a charge, except as provided under subsection (2) below. [Section E]⁶⁰

Subsection (2) allowed prosecutors to dismiss one or more counts of a multi-count indictment for nonviolent offenders as long as the defendant entered a plea to the "'essence' of the conduct engaged in." These guidelines remain the official policy of the Department of Law regarding charging practices at the time of this report. Reduction of a charge in 1980 was not permitted without the prior approval of the Attorney General or Chief Prosecutor. In more recent years, the authority to approve charge reductions was returned to the supervising attorney in each office, according to the head of the Anchorage office in 1989:

My understanding of the ban is that the attitude generally is that there should be very little plea bargaining. ...[I]t has been modified substantially since its inception. The office head makes the ultimate decision with the exception of homicides and then the chief prosecutor is involved. ... [The head of intake] can charge bargain on lower level felonies. Caps on sentence bargaining, e.g., sentence bargaining is discussed with the office head. In unclassified, Class A or sex abuse cases, I have to approve any bargaining where the most serious charge is reduced.

2. Current Charge Reduction and Dismissal Practices

Charge bargaining generally involves either the reduction of a charge (or charges) or the dismissal of one or more charges. In many cases, both events occur. Although reductions and dismissals may be done unilaterally by the prosecutor, as in Fairbanks

⁶⁰ 1980 STANDARDS, supra note 1 at 24.

immediately after the ban, the presence of reductions and dismissals is often assumed to be prima facie evidence for the existence of charge negotiations. Throughout Alaska in the mid-1980s charge reductions and dismissals were increasingly common, in most locations and for most types of offenses (Table 6). The clear implication, that this represented an increase in the level of frequency of charge negotiations, was strongly supported by most of the attorneys, judges, defendants and police officers interviewed.

A former director of the Alaska Department of Law's Criminal Prosecutions emphasized the differences between dismissals and charge reductions from a policy standpoint:

In general, prosecutors tend to see reduction of a charge as suggesting over-charging--not always, but it's a possibility. Dismissal of some charges, however, is seen as managing resources wisely. There are no negative connotations to it. Also, we do lots of dismissals in burglary and property cases, but more reductions in sex cases. They raise entirely different policy issues.

Because the two practices are seen as separate, they will be discussed individually first, and then combined for further analysis.

a. Charge Dismissals. Table 6 and Figure 4 show the incidence of dismissed charges associated with pleas of guilty or nolo contendere for Anchorage, Fairbanks and Juneau. For the three communities together, the percentages of pleas with dismissed charges were the same--12%--before and after the ban. In the mid-1980s, the percentages were higher, around 18% until 1987, then increasing sharply to 25%.

The differences by community reflect the variance in prosecutorial philosophies described in the interviews. The percentages of pleas associated with dismissals in Anchorage dropped from 13% to 11%, consistent with Attorney General Gross's directive prohibiting all forms of negotiation. In Fairbanks, however, they increased from 11% to 15%, indicating the implementation of the local District Attorney's policies. In the mid-1980's, the patterns of dismissals for both communities were more similar.

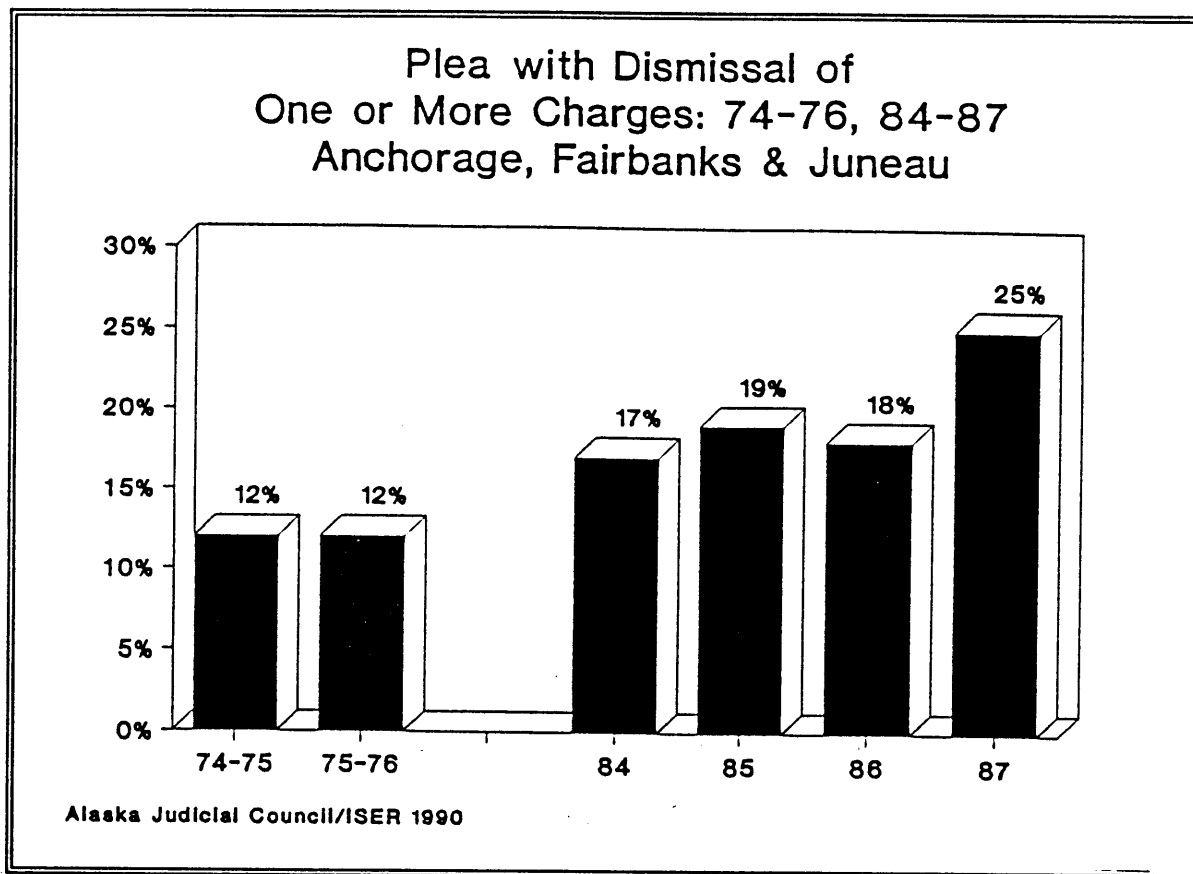


FIGURE 4

Patterns of pleas associated with dismissals in other areas of the state were not markedly different from Anchorage and Fairbanks. Southeast communities showed an increase peaking in 1986 and dropping a bit in 1987. Southcentral Alaska showed the largest increase, from 21% in 1984 to 34% in 1987. Bush communities were similar in their patterns to Anchorage and Fairbanks. Patterns by type of offense varied overall, but the trends were similar. For example, the percentage of pleas associated with dismissals for Theft II defendants was about half the percentage for Burglary I, but the trend of an increasing number of pleas associated with dismissals was the same.

The consequences of charge dismissals for the defendant were minimized by some attorneys, but others thought they provided a genuine benefit to the defendant:

TABLE 6 INCIDENCE OF PLEAS WITH DISMISSAL OF ONE OR MORE CHARGES Anchorage, Fairbanks, Juneau Combined						
Offense	1974- 1975	1975- 1976	1984	1985	1986	1987
All Offenses	12%	12%	17%	19%	18%	25%
All Violent	12%	12%	14%	17%	15%	18%
Robbery I	19%	21%	8%	8%	23%	21%
Assault II & III	10%	8%	16%	19%	16%	17%
All Property	10%	12%	15%	19%	17%	27%
Burglary I	8%	13%	19%	30%	24%	45%
Burglary II	9%	9%	18%	16%	19%	22%
Theft II	8%	11%	13%	11%	7%	14%
Crim. Mischief II	0%	8%	11%	24%	16%	20%
Forgery II	46%	37%	18%	23%	28%	31%
All Sexual	9%	9%	27%	24%	35%	27%
Sex Assault I	17%	8%	24%	30%	42%	26%
Sex Abuse I	7%	0%	34%	30%	50%	38%
Sex Abuse II	[0%]	[0%]	31%	13%	19%	23%
All Drugs	20%	14%	23%	20%	23%	24%
Drugs II & III	21%	14%	24%	20%	23%	23%

Alaska Judicial Council
Plea Bargaining Re-Evaluation, 1991

The only benefit that I perceive for the defendants that I deal with are fewer priors. When they reoffend, fewer priors work in the defendant's favor....Because judges typically are not imposing consecutive time to serve, I have less motivation to pursue those multiple counts. (Anchorage prosecutor)

The defendant may receive some benefit from a reduction of the number of counts--it looks better to the judge. (former Anchorage public defense attorney)

Not a lot of benefit to the defendant under the current system because most of the negotiations are dismissals of counts which would have a concurrent sentence anyway. The defendants may get something in presumptive sentencing the next time around as repeat offenders. Priors are a consideration under presumptive sentencing. (Fairbanks judge)

The court can still consider the dismissed charges. Overall, the sentence is about the same....One benefit is in having a reduction in the number of counts. It makes a difference on their record. (Juneau prosecutor)

b. Charge Reductions. Figure 5 and Table 7 show the changing patterns of charge reductions for Anchorage, Fairbanks and Juneau combined. The percentage of guilty or nolo contendere pleas associated with one or more reduced charges dropped noticeably immediately after the ban (26% to 20%). In 1984 the level was 28%, higher than the pre-ban level. It increased in 1986, and again in 1987 to 36%.

As with pleas associated with dismissals, the patterns of pleas associated with charge reductions were substantially different in Fairbanks than in the rest of the state. The Fairbanks and Anchorage rates of reductions were actually identical in the year preceding the ban, at 26% of filed cases. Immediately after the ban, charge reductions dropped sharply to 16% in Anchorage but increased slightly to 28% in Fairbanks.

Unlike the patterns of pleas associated with dismissals, pleas associated with reduced charges continued to show very different patterns in the 1980s in Anchorage

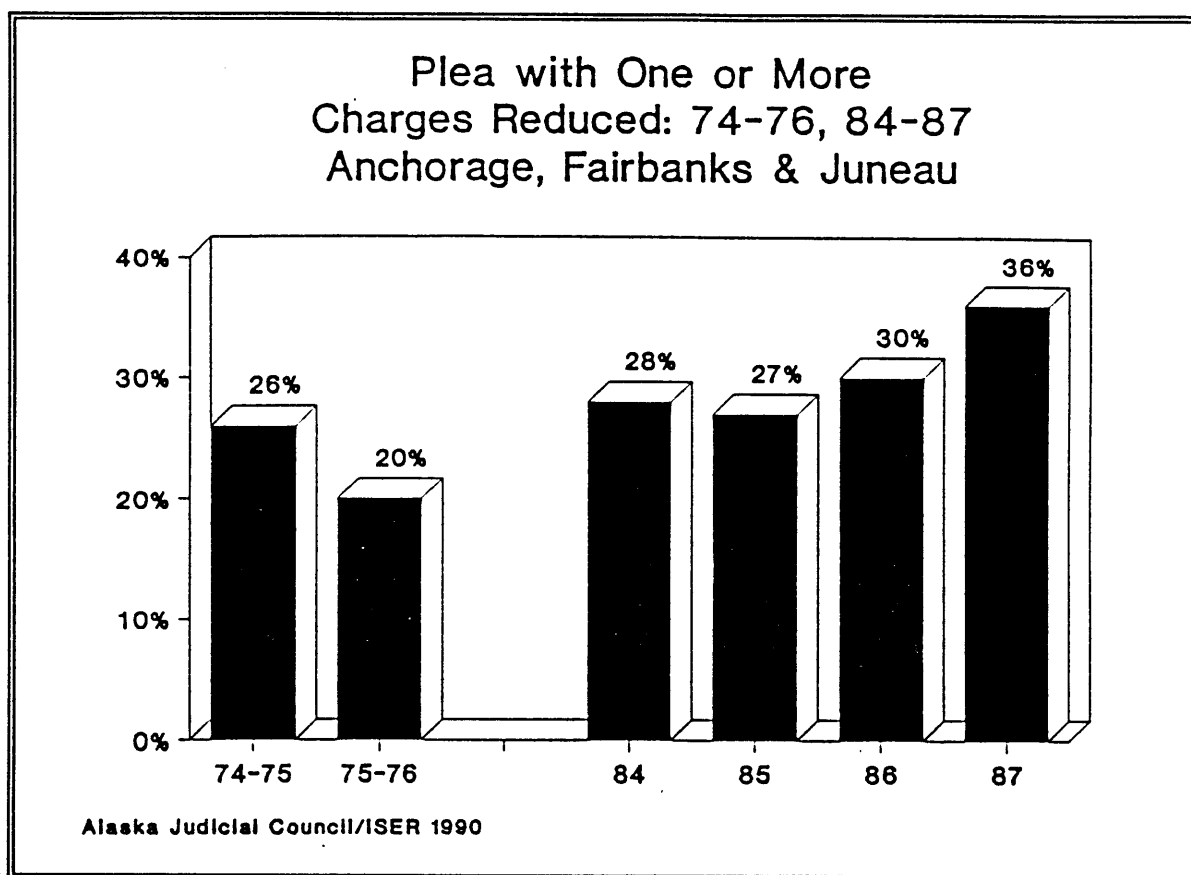


FIGURE 5

and Fairbanks. In Anchorage, the reduced charge pleas, which had been 16% of all filed cases in the year after the ban, were 33% of all filed cases in 1984 and increased to 41% of all filed cases in 1987. By contrast, in Fairbanks, the percentage dropped from 28% immediately after the ban to 19% in 1984, and dropped even further to 16% in 1987. Other areas of the state looked very similar to Anchorage in the 1980s, with one-quarter to one-third of their 1984 cases involving pleas associated with reduced charges and over 40% of their 1987 cases in that category. The differences emphasize the continuing importance of local policies within the context of the broader state policy.

Benefits from a charge reduction were easier to identify than those flowing from dismissals of some charges against the defendant. The clearest benefit came either from reduction of a presumptive charge to a non-presumptive charge or from a felony to a misdemeanor:

TABLE 7 PLEA TO REDUCED CHARGE BY TYPE OF OFFENSE Anchorage, Fairbanks, Juneau Combined						
Offense	1974- 1975	1975- 1976	1984	1985	1986	1987
All Offenses	26%	20%	28%	27%	30%	36%
All Violent	24%	23%	42%	38%	42%	57%
Robbery I	15%	17%	31%	6%	28%	46%
Assault II & III	27%	25%	48%	45%	47%	58%
All Property	30%	24%	25%	24%	27%	29%
Burglary I	35%	26%	37%	28%	38%	35%
Burglary II	36%	17%	23%	19%	25%	22%
Theft II	31%	31%	21%	15%	28%	26%
Crim. Mischief II	27%	0%	36%	54%	14%	48%
Forgery II	11%	8%	3%	15%	16%	12%
All Sexual	23%	13%	31%	27%	33%	35%
Sex Assault I	11%	4%	26%	21%	46%	28%
Sex Abuse I	36%	21%	42%	38%	36%	45%
Sex Abuse II	[0%]	[33%]	29%	18%	19%	27%
All Drugs	20%	9%	13%	22%	22%	27%
Drugs II & III	20%	11%	15%	21%	20%	26%

Alaska Judicial Council
Plea Bargaining Re-Evaluation, 1991

Charge bargaining does not necessarily reduce the sentence length, but it may drop the charge from a presumptive to a nonpresumptive and the defendant is then parole eligible. (Anchorage prosecutor)

The client benefits by a charge reduction, but not when two out of three of his class B felony charges are reduced. If the case is reduced from a felony to a misdemeanor, the defendant will benefit quite a lot. And, if a case is reduced from an unclassified to a class A, his maximum exposure is reduced considerably. (Anchorage public defense attorney)

I have often seen them charge the higher and allow the defendant to plead to the lesser, overcharging. It really doesn't benefit the defendant to charge the presumptive and then lower it to below the presumptive just to get the guy to plead. (Former Fairbanks private defense attorney)

In the short term the defendant will benefit a great deal. In the long term, the benefit to the defendant is questionable. In the short term, I can get a defendant's charge reduced from a felony to a misdemeanor, and they may spend less time in jail. But for the repeat offender who fails on probation, he will spend as much time incarcerated as he would if he had been convicted of the Class C felony. (Rural public defense attorney)

Nominal benefit to the defendant; greater benefit to the state's pocketbook. Felonies: agree to reduce a B to a C, the defendant may receive only a year; but the state does not have to pay for a trial and it saves a year of housing the defendant. (Rural private defense attorney)

c. Combined Effects of Charge Reductions and Dismissals. Despite some significant differences between charge reductions and dismissals in patterns of occurrence and meaningfulness to participants in the justice system, both are often lumped together. They can be referred to as charge negotiation or bargaining, to distinguish the practices from situations in which negotiation centers on the length or terms of the sentence to be imposed on the defendant. Alaskan attorneys often

distinguished between "real plea bargaining" by which they meant sentence bargaining, and charge negotiations:

We don't do conventional plea bargaining with a sentence agreement. But we do an enormous amount of charge bargaining and some sentence bargaining. (Anchorage public defense attorney)

There is a difference between charge bargaining and classic plea bargaining. Charge bargaining is relatively common. What is far more rare are sentence agreements, a package presented to the judge. (Anchorage public defense attorney)

Charge reductions and dismissals viewed together give a picture of the changing patterns of case dispositions. Figure 6 and Table 8 show that guilty or nolo contendere

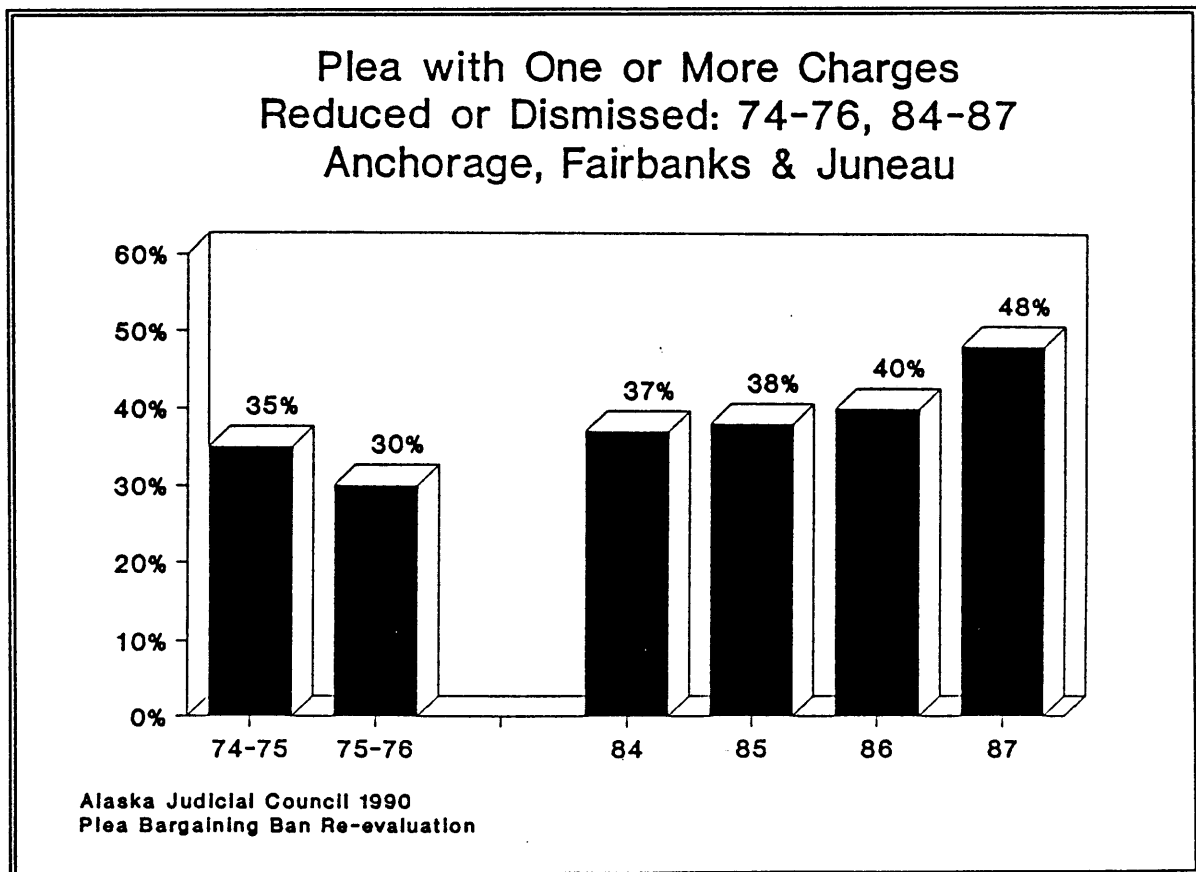


FIGURE 6

TABLE 8 INCIDENCE OF PLEAS WITH REDUCTION OR DISMISSAL OF ONE OR MORE CHARGES, BY SPECIFIC OFFENSE (Percentage of Anchorage, Fairbanks, Juneau Filed Cases)						
Offense	1974- 1975	1975- 1976	1984	1985	1986	1987
All Offenses	35%	30%	37%	38%	40%	48%
All Violent	33%	31%	46%	44%	46%	60%
Robbery I	32%	32%	37%	10%	36%	50%
Assault II & III	34%	30%	52%	52%	51%	59%
All Property	37%	34%	34%	36%	38%	45%
Burglary I	42%	35%	46%	46%	48%	64%
Burglary II	39%	23%	38%	33%	43%	41%
Theft II	35%	39%	27%	22%	31%	33%
Crim. Mischief II	27%	8%	39%	59%	27%	53%
Forgery II	50%	40%	20%	35%	42%	40%
All Sexual	33%	21%	42%	41%	50%	46%
Sex Assault I	28%	13%	37%	40%	58%	37%
Sex Abuse I	43%	21%	51%	51%	62%	60%
Sex Abuse II	[0%]	[33%]	47%	28%	34%	40%
All Drugs	37%	22%	29%	35%	36%	42%
Drugs II & III	38%	23%	31%	34%	35%	41%

This table shows the percentages of all filed and completed cases in which a charge reduction or dismissal occurred at any time during the case processing between referral to the prosecutor and final disposition. It does not include cases in which all charges were declined for prosecution.

Alaska Judicial Council
Plea Bargaining Re-Evaluation, 1991

pleas associated with the reduction or dismissal of one or more charges were 35% of all dispositions prior to the ban on plea bargaining. They dropped to 30% in the first year after the ban, reflecting the implementation of the Attorney General's policy to some extent. Charge reductions and dismissals continued, even after the policy changed. In part these were a result of unilateral decisions by the prosecutor, as one of those interviewed for the 1978 report noted:

I know deep inside the moment I make the charge Assault with a Dangerous Weapon [rather than Shoot with Intent to Kill] he is going to plead to it. Does this make it a charge bargain? We have to have the flexibility to respond to facts that come to our attention after indictment. [assistant district attorney]⁶¹ (note omitted)

In part, charge reductions and dismissals were a continuation of prior practices, as another assistant district attorney in Anchorage commented in the 1978 report:

It's becoming more and more apparent that the Attorney General didn't have that much against charge bargaining....At the last DAs' conference the Attorney General expressly told us that if the defendant says he'll plead to one count, we can indicate in advance that we'll dismiss the others. The same goes for lesser included offenses of a single count--this does not require any approval at all.⁶²

The separate tables for plea reductions and dismissals indicate that both were above their pre-ban levels in 1984, and Figure 6 depicts graphically the fact that the combined percentage is also higher than the pre-ban level. From 37% in 1984, the percentage of pleas associated with reduced or dismissed charges increased to 48% in 1987. Nearly half of all filed cases were disposed of through pleas of guilty or nolo contendere that were associated with reduced or dismissed charges.

⁶¹ ALASKA BANS PLEA BARGAINING, supra note 8, at 68.

⁶² Id. at 67.

Charge reductions and dismissals, according to the interviews, eventually replaced sentence recommendations after the ban to some extent. In the original evaluation of the ban, recommendations for a specific sentence length were made for a little over 20% of all charges in the pre-ban year in Anchorage, for 15 to 21% of Fairbanks charges, and for 29 to 32% of Juneau charges. In the post-ban year, sentence recommendations for a specific sentence dropped to 6 to 9% of Anchorage charges, 2 to 4% of Fairbanks charges, and 4 to 13% of Juneau charges.⁶³ During the same period, and still using the original study's analyses, pleas to reduced charges dropped slightly from 18% to 13% in Anchorage, and from 19% to 18% in Juneau; in Fairbanks, they increased from 17% to 19%.⁶⁴ In contrast, interviewees tended to agree that sentence recommendations were relatively uncommon during the 1980s, and that charge reductions and dismissals characterized negotiations between attorneys.

The rates of reductions and dismissals combined varied somewhat by offense. For Anchorage, Fairbanks and Juneau combined, Theft II, Sex Assault I and drug offenses generally showed lower rates of charge changes. Assault II and III, Burglary I and Sexual Abuse of a Minor I had relatively high rates of charge reductions and dismissals.

Type of offense also was related to the likelihood that the rate had changed between 1984 and 1987 (Table 8). The most common Class C property offenses (Theft II and Burglary II), for example, had relatively low rates of reductions and the rates changed only slightly in the four-year period. The rates of reductions and dismissals of sexual offenses also were little different at the end of the period from those at the beginning. Burglary I, drug offenses and violent offenses, on the other hand, showed large increases in the rates of charge reductions and dismissals.

Location of the case, however, was one of the most important factors in determining whether a defendant was offered the opportunity to plead to a reduced

⁶³ Id. at Appendix B, Table II-1.

⁶⁴ Id. at Appendix B, Table V-1.

charge or had some charges dismissed. Figure 7 compares the rates of charge reductions and dismissals combined for Anchorage and Fairbanks. Prior to the ban, the two communities had almost identical rates (Anchorage, 35% and Fairbanks, 34%). Immediately after the ban, the Fairbanks rate went up, to 39%, and the Anchorage rate dropped to 26%. That situation was reversed by 1984, with Fairbanks having a rate of 31% of pleas associated with charge reductions or dismissals and Anchorage having a rate of 40%. The Anchorage rate increased steadily in the next two years, then jumped from 42% in 1986 to 52% in 1987. The Fairbanks rate dropped slightly in 1985, to 28% and then increased to 35% in 1987. It is apparent from the comparison that the Attorney General's policy was interpreted differently from the beginning in the two communities.

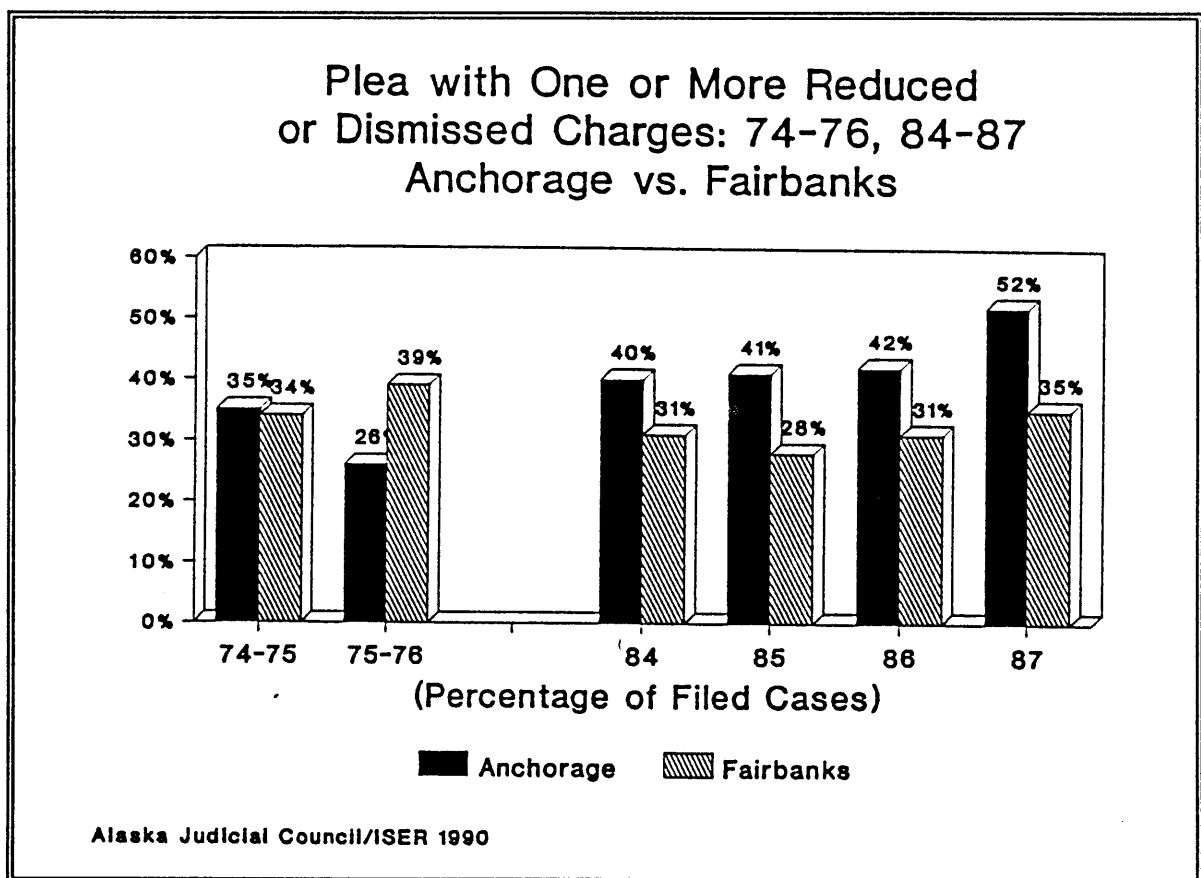


FIGURE 7

3. Amount of Charge Negotiation; Timing of Charge Reductions and Dismissals; Types of Charge Reductions

To obtain a better sense of attorneys' practices during the late 1980s and to complement the data compiled, the attorneys and judges interviewed were asked to respond to several general questions about methods of case disposition. Two hypothetical cases were presented as well, to permit interviewees to react to specific situations. One case involved Sexual Abuse of a Minor I;⁶⁵ the other was a Robbery I.⁶⁶

a. General Findings. Attorneys and judges interviewed were asked to estimate in what percentage of their current and recent cases charge negotiations and sentence negotiations for pleas occurred. Table 9 shows responses for charge negotiations by type of attorney and area. Over half thought that negotiations were involved in a majority of their cases. In general, defense attorneys gave higher estimates

⁶⁵ The Sex Abuse of a Minor I case was:

Defendant: 45-year-old man, two children and spouse, works regularly, but at low-level employment. No prior convictions. Suggestion of inappropriate sexual conduct three years before, but not formally charged.

Offense: Twelve-year-old daughter reports the defendant (father) made sexual advances over a one to two month period, culminating in digital penetration and fondling. Defendant denies the offense.

Charge: The defendant is charged with three counts of first degree sexual abuse of a minor. Charge has an eight-year presumptive sentence if convicted.

⁶⁶ The Robbery I case was:

Defendant: 20-year-old defendant, no prior record, minimal juvenile record (petty theft, joyriding), two years in military but bounced from service for marijuana use. Decent work history, average schooling, substance abuse problem.

Offense: Defendant robs a 7-11 store by brandishing a knife; takes under \$100. No physical confrontation with the clerk. The defendant is apprehended at the scene; he immediately confesses. The defendant is intoxicated (alternatively, high on coke).

Charge: The defendant is charged with first degree robbery. The charge has a seven-year presumptive if defendant is convicted of serious weapon; five years otherwise.

TABLE 9 INTERVIEW ESTIMATES OF CHARGE REDUCTIONS (INTERVIEW RESPONSE PLACED IN HIGHEST CATEGORY) (Actual number of responses)				
	Judge	Prosecutor	Public Defense	Private Defense
Anchorage				
25% or less	2	3	0	2
26 - 50%	2	1	2	0
51 - 75%	4	5	2	2
76 - 100%	2	2	4	7
DK, NA			2	
Fairbanks				
25% or less	1	1	1	0
26 - 50%	2	2	2	1
51 - 75%	2	2	4	1
76 - 100%	0	0	0	0
DK, NA			1	
Southeast				
25% or less	0	0	0	1
26 - 50%	0	1	0	1
51 - 75%	0	1	1	1
76 - 100%	3	0	1	1
DK, NA				
Bush				
25% or less	0	0	1	0
26 - 50%	3	3	1	1
51 - 75%	1	1	0	1
76 - 100%	2	0	2	3
DK, NA				

Alaska Judicial Council
Plea Bargaining Re-Evaluation, 1991

than prosecutors and judges. Prosecutors overall thought that half or fewer of their cases had some negotiation.

Area was an important determinant of the perceived level of negotiation. A majority of the Anchorage practitioners said that over half of their cases involved negotiations. In Fairbanks and the rural areas, fewer than 50% said that cases were negotiated. Fairbanks attorneys and judges agreed that fewer than 75% of cases resulted in charge reductions or dismissals. In Southeast, all judges and public defense attorneys estimated that over 50% of cases were negotiated.

The perceptions were generally consistent with the reality of case disposition patterns, as shown by a comparison with Table 8. Table 8 shows that by 1987, a majority of violent cases, burglary I's, criminal mischief II's, and sex abuse I cases filed resulted in a plea of guilty or nolo contendere associated with reduced or dismissed charges. Forty-eight percent of all offenses in Anchorage, Fairbanks and Juneau combined fit this pattern of charge reductions and dismissals in 1987.

Table 10 confirms the general sense obtained from the interviews that a slight majority of all convicted cases were associated with changes in the charges originally filed by the prosecutor. Nearly three-quarters of violent crime convictions involved a charge reduction or dismissal, but within that category, the specific offense of Robbery I had very low rates of charge reductions and dismissals. The most numerous property offenses (Theft II, Burglary II and Forgery II) all had relatively low rates, but Burglary I which started low (28% in 1984) ended with a much higher rate (54% in 1987). The patterns found suggest that part of the reason that interviewee's perceptions of charge negotiations differed may have been because they handled different types of cases, in which reductions were more or less likely to occur. Table C-1 shows the actual charges of reduction for the most frequent original charges filed between 1984 and 1987. Comparison of the offenses shows clearly that while some charges are reduced infrequently (e.g., drugs), others (e.g., assault III) are reduced much of the time.

TABLE 10 INCIDENCE OF PLEAS WITH REDUCTION OR DISMISSAL OF ONE OR MORE CHARGES, Anchorage, Fairbanks, and Juneau Combined (Percentage Distributions, Convicted Cases Only)						
Offense	1974- 1975	1975- 1976	1984	1985	1986	1987
All Offenses	65%	57%	56%	56%	55%	60%
All Violent	62%	61%	64%	60%	66%	74%
Robbery I	33%	43%	16%	6%	23%	10%
Assault II & III	36%	37%	58%	67%	69%	65%
All Property	69%	62%	55%	52%	50%	54%
Burglary I	50%	38%	28%	38%	44%	61%
Burglary II	22%	33%	38%	36%	37%	31%
Theft II	36%	47%	29%	27%	26%	33%
Forgery II	57%	64%	37%	43%	43%	44%
All Sexual	64%	36%	50%	50%	57%	56%
All Drugs	64%	47%	41%	53%	45%	49%
Drugs II & III	50%	37%	39%	46%	41%	35%

Alaska Judicial Council
Plea Bargaining Re-Evaluation, 1991

b. Specific Communities

1) Anchorage. The pre-indictment hearing in Anchorage was mentioned earlier in the discussion of screening. During the mid-1980s it became a distinguishing characteristic of Anchorage prosecutions; no other prosecutor's office in the state had a similar procedure. It has played a major role in the evolution of the policy prohibiting plea bargaining in Anchorage. According to the attorney who was responsible for the pre-indictment hearings:

Screening is used as a case management tool. We now have a 'pre-indictment hearing.' There's no rule governing such a thing, but every Tuesday and Thursday I get to chat with defense attorneys and the whole purpose of the hearing is to stop the clock so I have a chance to 'screen' the case. This means defense must waive presentation to the grand jury for a week or two. If the case has weaknesses that can't be remedied then the charge will be reduced, dismissed or consolidated with other charges. During this period we also consider whether from a social interest viewpoint if this is the type of case to which we want to allocate resources....I give them the police reports before the meeting; then we discuss the pros and cons of the case from a prosecutor's and defense point of view. We're very candid -- all weaknesses are explored. The defense reveals alibi witnesses, something that usually they wouldn't do, and we work things out. I can make interest of justice decisions....The criminal justice system is well served by this kind of negotiation.

Attorneys who handled cases at intake in Anchorage, whether prosecutors or defense attorneys, estimated that charge negotiations (i.e., some level of discussion about a case) occurred in a majority of their cases. Some attorneys noted that they asked for a charge reduction or dismissal of some charges in every case; one private attorney added that a majority of the discussions were initiated by the prosecutor. Another said that 100% of his cases were discussed, adding, "You can get an offer on anything, although it may not mean much." A manual of criminal defense procedures for Anchorage says:

Current state policy eliminates most plea bargaining after a defendant is indicted, but before the indictment the intake DA may consider an agreed-upon disposition if defense counsel points to weaknesses in the original charge or other factors disfavoring a trial.⁶⁷

Table 11 supports these comments. Charge reductions or dismissals occurred in a sizable percentage of all Anchorage cases between 1984 and 1987. With only a few exceptions (sex assault I, sex abuse of a minor II), the percentages of reductions and dismissals were higher in 1987 than in 1984, indicating a trend to more frequent changes in charges.

Table 12 shows the timing of charge reductions in Anchorage, based on analysis of the 1986-1987 subset of the larger database. The data show that in Anchorage most reductions occurred either prior to filing of the case or prior to the indictment. The percentage of cases reduced before indictment was higher in Anchorage than anywhere else in the state except the rural areas. Figure 8, which shows the statewide pattern of timing of charge reductions and dismissals, indicates that reductions were more likely to occur prior to indictment, while dismissals tended to occur at the end of the case. Because of the large number of cases, the Anchorage pattern tends to dominate the statewide data.

Attorneys who handled cases after indictment in Anchorage gave much lower estimates of the cases in which charge negotiations occurred, ranging from about 5 to 20%. Prosecutors and public defense attorneys agreed on these post-indictment figures which were also consistent with the statistical data, but private attorneys had more varying experiences. Some said that charge negotiations occurred in most cases; others said they happened in few or no cases. One Anchorage private attorney remarked:

⁶⁷ S. ORLANSKY, supra note 26, at 4.

TABLE 11 INCIDENCE OF PLEAS WITH REDUCTION OR DISMISSAL OF ONE OR MORE CHARGES (Percentage of Anchorage Filed Cases)						
Offense	1974- 1975	1975- 1976	1984	1985	1986	1987
All Offenses	35%	26%	40%	41%	42%	52%
All Violent	32%	30%	47%	46%	45%	66%
Robbery I	35%	27%	43%	15%	36%	54%
Assault II & III	32%	29%	52%	53%	50%	68%
All Property	39%	27%	39%	43%	41%	49%
Burglary I	44%	17%	46%	54%	55%	64%
Burglary II	34%	19%	46%	42%	42%	44%
Theft II	37%	32%	32%	24%	38%	44%
Crim. Mischief II	[17%]	[13%]	55%	65%	24%	59%
Forgery II	57%	42%	19%	39%	40%	41%
All Sexual	35%	25%	41%	44%	56%	46%
Sex Assault I	31%	12%	43%	44%	59%	32%
Sex Abuse I	[38%]	[33%]	47%	53%	65%	67%
Sex Abuse II	---	---	42%	33%	50%	39%
All Drugs	29%	18%	29%	33%	34%	44%
Drugs II & III	29%	19%	34%	33%	33%	44%

Alaska Judicial Council
Plea Bargaining Re-Evaluation, 1991

TABLE 12
TIMING OF CHARGE REDUCTIONS WITH PLEA
 (Percentage of Filed Cases, Except for Screening Phase)

	Screening	Before Indictment	Indictment & Before Final	Final Disposition
By Major Geographic Area				
Statewide	1%	17%	7%	6%
Anchorage	1%	23%	4%	7%
Fairbanks	0%	5%	5%	4%
Southeast	3%	13%	10%	4%
Southcentral	0%	0%	7%	7%
Bush	0%	23%	16%	8%
By Type of Most Serious Arrest Charge				
	0%	6%	17%	4%
Murder-Kidnapping	1%	30%	12%	8%
Violent	1%	14%	3%	6%
Property	0%	9%	3%	6%
Drugs	2%	18%	14%	6%
Sexual				
By Selected Arrest Charge				
Assault II	3%	37%	20%	8%
Assault III	2%	32%	8%	2%
Theft II	2%	11%	2%	2%
Burglary I	1%	17%	5%	4%
Burglary II	1%	16%	2%	8%
Forgery II	0%	6%	4%	3%
Drugs III	0%	6%	3%	5%

Alaska Judicial Council
 Plea Bargaining Re-Evaluation, 1991

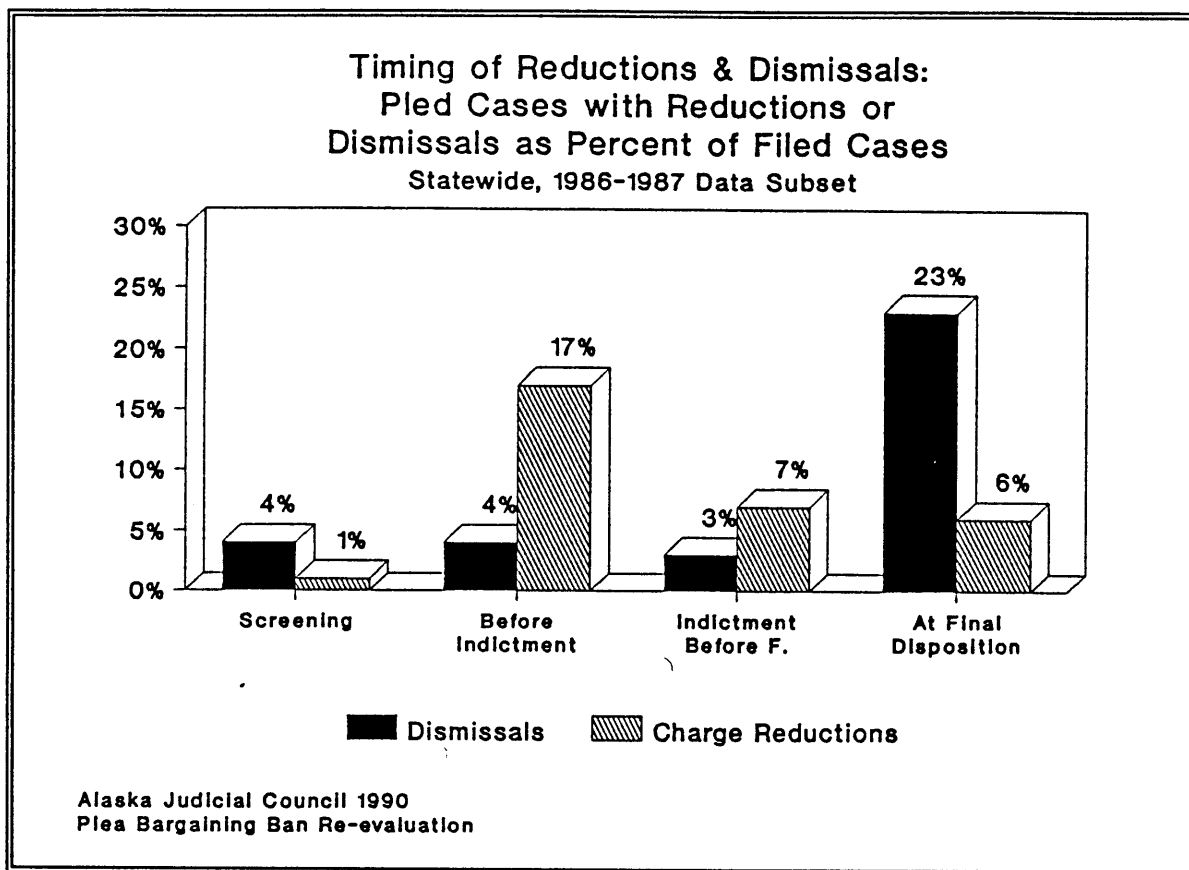


FIGURE 8

Frequently, I do not get cases until after the defendant has been indicted, and then there is not much negotiating. Negotiations vary widely from case to case. I usually receive offers at the preindictment level in all my cases.

Prosecutors' remarks confirmed the perceptions of defense attorneys that relatively few Anchorage cases could be negotiated after the indictment:

Ten to twenty percent of my cases have charge negotiations. Once it is out of intake there is little charge negotiation.

In 75% of the cases, discussion occurs before they get to me. By the time the case gets to me, there is little negotiating.

2) Fairbanks. Table 13 shows the actual percentages of filed Fairbanks cases in which charges were reduced or dismissed. The percentages were

TABLE 13 INCIDENCE OF PLEAS WITH REDUCTION IN MOST SERIOUS ARREST CHARGE OR DISMISSAL OF ONE OR MORE CHARGES Fairbanks Cases by Type of Offense*						
Fairbanks	1974- 1975	1975- 1976	1984	1985	1986	1987
All Offenses	34%	39%	31%	28%	31%	35%
All Violent	33%	33%	35%	36%	41%	42%
Robbery I	25%	47%	9%	0%	33%	[0%]
Assault II & III	35%	32%	44%	47%	50%	41%
All Property	32%	49%	25%	20%	28%	31%
Burglary I	[33%]	58%	38%	25%	19%	64%
Burglary II	31%	32%	19%	15%	43%	35%
Theft II	33%	55%	15%	16%	24%	8%
Crim. Mischief II	[40%]	[0%]	25%	[44%]	[17%]	10%
Forgery II	[25%]	42%	[33%]	20%	40%	30%
All Sexual	31%	18%	52%	35%	41%	46%
Sex Assault I	[25%]	[20%]	33%	40%	[33%]	[67%]
Sex Abuse I	[40%]	[20%]	75%	39%	62%	62%
Sex Abuse II	---	[0%]	70%	27%	[13%]	[22%]
All Drugs	49%	28%	35%	43%	34%	23%
Drugs II & III	54%	29%	35%	43%	35%	23%

- * This table shows the percentages of all filed cases in which a charge reduction or dismissal occurred at any time during the case processing between referral to the prosecutor and final disposition. It does not include cases in which all charges were declined for prosecution.

Alaska Judicial Council
Plea Bargaining Re-Evaluation, 1991

generally low, compared to Anchorage, and did not show the consistent upward trend found in Anchorage between 1984 and 1987. A sizable number of interviewees, however, estimated that charge reductions or dismissals occurred in 50 to 75% of their cases. Public defense attorneys were especially likely to anticipate charge reductions in a large percentage of their cases. However, no attorneys or judges appeared to believe that charge reductions occurred in more than 75% of all cases. Table 13 emphasizes the relatively low percentage of charge reductions, and highlights the fact that relatively few of the reductions occurred prior to indictment. One prosecutor commented:

At the grand jury, we'll seek multiple counts with the intent to drop some and convict on the core charge. Some drug cases, a few assault cases, are reduced to a single charge.

3) Other Communities. Attorneys and judges in Southeast Alaska described a pattern opposite that found in Fairbanks. Whereas no Fairbanks judges thought that over 75% of the cases involved charge reductions or dismissals, no Southeast judges thought that fewer than 75% involved charge reductions. In the bush communities, the diversity reflected on Table 9 masks the tendency within an individual community for the interviews to show agreement among the attorneys and judges. In Bethel, for example, judges, prosecutors and public defense counsel thought that about 50% of the cases involved charge negotiations. Private defense counsel, however, almost unanimously thought that the percentage was 80% or better. Kotzebue practitioners agreed on a 75 to 100% range, and Nome attorneys thought the range was closer to 50%.

The timing and percentages of charge reductions varied greatly by area. Southeast had a moderate number of charge reductions, done either before or at indictment. Southcentral communities had no charge reductions at all prior to indictment, and a fairly low percentage at or after indictment. The Bush communities had no charge reductions at the screening stage, but the largest percentages of any location at all other points in the process (they had equal numbers with Anchorage of pre-indictment charge reductions).

c. Types of Charge Reductions. Charge reductions varied by time in the case disposition process, by type of offense, by amount of the reduction, and by location. Table 14 compares the court locations by the percentage of convicted cases in which the defendant pled to the top charge, a lesser felony, a misdemeanor or was convicted after trial. As would be expected, Fairbanks had the largest percentage of offenders convicted on the original most serious charge. It also had the lowest percentages of persons convicted of either lesser felonies or misdemeanors, and the highest percentage convicted after trial. Barrow had the highest percentage of tried cases, combined with moderate percentages of lesser felonies and misdemeanors. With the exceptions of Barrow, Kenai, Palmer, and Sitka, the smaller communities had only about one-third of the convictions in the category of "pled to the top charge."

<p style="text-align: center;">TABLE 14</p> <p style="text-align: center;">CONVICTIONS BY LOCATION</p> <p style="text-align: center;">CONVICTED CASES ONLY</p> <p style="text-align: center;">(Showing reductions from time of referral through conviction)</p>				
	Pled To Top Charge	Pled To Lesser Felony	Pled To Misdemeanor	Convicted After Trial
Anchorage	45%	14%	29%	12%
Fairbanks	62%	12%	11%	14%
Juneau	53%	14%	26%	6%
Barrow	46%	14%	18%	21%
Bethel	33%	32%	27%	8%
Kenai	51%	19%	25%	5%
Ketchikan	36%	29%	26%	9%
Kodiak	35%	21%	34%	10%
Kotzebue	36%	22%	39%	4%
Nome	38%	28%	30%	4%
Palmer	52%	19%	25%	5%
Sitka	47%	25%	21%	8%
Valdez	31%	22%	44%	2%

Alaska Judicial Council
Plea Bargaining Re-Evaluation, 1991

Anchorage's percentage of misdemeanors was one of the higher; its percentage of lesser felonies was among the lower. The table suggests that Anchorage defendants may be obtaining a greater benefit for the entry of their guilty or nolo contendere pleas

than defendants in other areas. A relatively high percentage of Anchorage defendants had been convicted after a trial, which may reflect the interview testimony that little negotiating occurred in Anchorage after the pre-indictment process was completed.

Table 15 and the more detailed charge reduction tables in Appendix C show charge reductions for the most individual offenses of conviction. Table 15 emphasizes the limited likelihood of reductions in drug charges (except the unclassified offense of misconduct involving a controlled substance in the first degree) as compared to the very high likelihood of a reduction in an assault charge. The table also shows that reduction to a misdemeanor happened quite infrequently in the most serious offenses (unclassified and class A). In a few instances, defendants were convicted of an offense within the same class, or a higher class. Typically, offenses of a higher class would have been added by the prosecutor either at the time of filing or before indictment.

d. Hypothetical Cases. Interviewees were also asked to discuss two hypothetical cases, a first degree sexual abuse of a minor and a robbery in the first degree.⁶⁸ The sexual abuse offense carried a presumptive sentence of eight years for a first felony offender; the robbery sentence, also presumptive for first felony offenders, was either five or seven years depending on the use of a weapon or harm to the victim. Table 16a and 16b shows the distribution of expected dispositions for the sexual abuse and robbery offenders by community and type of attorney.

The findings from the sexual abuse hypothetical case about likelihood of charge reductions were consistent with the other interview data. Attorneys in Anchorage and Fairbanks expected the most severe disposition of the case and were most likely to consider trial a possibility. Between 53% (Fairbanks) and 59% (Anchorage) thought it likely that the defendant would plead to or be convicted of at least one of the original charges. Attorneys in the Bush, Southeast and Southcentral generally thought that the charges would be reduced, both in number and level of offense, and that the defendant would receive a sentence much lower than the presumptive of eight years. The

⁶⁸ See supra notes 65 and 66 for the text of these cases.

<p>TABLE 15</p> <p>CHARGE REDUCTIONS BY SPECIFIC OFFENSE</p> <p>CONVICTED ONLY</p>		
	Convicted of Original	Convicted of Misdemeanor
Unclassified		
Murder I	51%	0%
Murder II	30%	9%
Kidnap	14%	21%
Sexual Assault I	43%	7%
Sexual Abuse of Minor I	42%	2%
Drugs I	19%	13%
Class A		
Manslaughter	45%	6%
Assault I	25%	18%
Robbery I	61%	9%
Drugs II	78%	3%
Class B		
Assault II	16%	56%
Sexual Assault II	23%	42%
Sexual Abuse of Minor II	63%	9%
Robbery II	30%	44%
Theft I	51%	7%
Burglary I	45%	34%
Forgery I	50%	15%
Misc. Weapon I	69%	26%
Drugs III	77%	8%
Perjury	90%	0%
Class C		
Negligent Homicide	38%	25%
Assault III	29%	70%
Theft II	56%	38%
Burglary II	62%	30%
Criminal Mischief II	33%	64%
Forgery II	82%	12%
Drugs IV	60%	37%
Promote Contraband I	69%	31%

Alaska Judicial Council
Plea Bargaining Re-Evaluation, 1991

TABLE 16a

**HYPOTHETICAL SEXUAL ABUSE CASE
MOST LIKELY DISPOSITION
BY ATTORNEY TYPE AND LOCATION**

Charge Outcome	Defendant's Likely Sentence				
	8-year pres. or higher	4-6 years, may be pre.	1-3 years, non-pres.	Probation/jail up to 1 year	No sent. specif.
Anchorage					
Defendant pleads to original charge(s)	5 judges 1 DA 2 PD 2 OPA 4 PC	1 judge 1 DA 1 PD			1 PC
Defendant tried on original charge(s)	4 PD 2 PC				
Defendant pleads to Class A, attempt		3 DA			
Defendant pleads to Class B, C, or other lesser		2 PC	1 judge		2 DA 1 PC
Prosecution declined					1 DA
Fairbanks					
Defendant pleads to original charge(s)	2 judges 1 DA 4 OPA	1 PD			
Defendant tried on original charge(s)	1 judge 2 DA 1 PC				
Defendant pleads to Class A, attempt					
Defendant pleads to Class B, C, or other lesser		1 DA	1 PD 1 PC	1 PD	1 DA 1 PC
Prosecution declined					

TABLE 16a (Continued)

**HYPOTHETICAL SEXUAL ABUSE CASE
MOST LIKELY DISPOSITION
BY ATTORNEY TYPE AND LOCATION**

Charge Outcome	Defendant's Likely Sentence				
	8-year pres. or higher	4-6 years, may be pre.	1-3 years, non-pres.	Probation/jail up to 1 year	No sent. specif.
Southeast					
Defendant pleads to original charge(s)		1 judge			
Defendant tried on original charge(s)	1 PD				
Defendant pleads to Class A, attempt		1 DA 1 PC			
Defendant pleads to Class B, C, or other lesser		1 DA 1 judge 1 PC			1 PD 2 PC
Prosecution declined					
Bethel					
Defendant pleads to original charge(s)					
Defendant tried on original charge(s)	1 PC				
Defendant pleads to Class A, attempt					
Defendant pleads to Class B, C, or other lesser			1 DA 1 PD 1 OPA 2 PC		1 judge 1 DA
Prosecution declined					

TABLE 16a (Continued)

**HYPOTHETICAL SEXUAL ABUSE CASE
MOST LIKELY DISPOSITION
BY ATTORNEY TYPE AND LOCATION**

Charge Outcome	Defendant's Likely Sentence				
	8-year pres. or higher	4-6 years, may be pre.	1-3 years, non-pres.	Probation/jail up to 1 year	No sent. specif.
Barrow, Nome, Kotzebue					
Defendant pleads to original charge(s)			1 judge		
Defendant tried on original charge(s)	1 judge 1 PD				
Defendant pleads to Class A, attempt					
Defendant pleads to Class B, C, or other lesser		1 judge 1 DA	1 judge 1 DA 1 PD		1 PC 1 PD
Prosecution declined					

Abbreviations: DA = prosecutor; PD = public defender; OPA = Office of Public Advocacy (public defense); PC = private defense counsel

Alaska Judicial Council
Plea Bargaining Re-Evaluation, 1991

<p align="center">TABLE 16b</p> <p align="center">HYPOTHETICAL ROBBERY CASE</p> <p align="center">MOST LIKELY DISPOSITION</p> <p align="center">BY ATTORNEY TYPE AND LOCATION</p>						
Charge Outcome	Defendant's Likely Sentence					
	7-year presump.	5 years, presump.	2-5 years, non-pres.	Probation/jail, up to 2 yr.	No sent. specif.	Refer to 3-judge
Anchorage						
Defendant pleads to original charge(s)	2 judges 3 DA 2 OPA 2 PC			1 PC		1 judge 2 DA 4 PD 2 PC
Defendant tried on original charge						
Defendant pleads to Class B, C, or other lesser		2 judges	1 DA 2 PD 2 PC	1 judge 1 DA 1 PD 1 PC	3 DA 2 PC	
Fairbanks						
Defendant pleads to original charge(s)	1 judge 1 DA 1 OPA	1 judge 1 OPA	2 DA			2 judges 2 DA 1 PD 1 OPA 1 PC
Defendant tried on original charge	1 PD					
Defendant pleads to Class B, C, or other lesser			1 OPA	1 PD 1 PC		

Abbreviations: DA = prosecutor; PD = public defender; OPA = Office of Public Advocacy (public defense); PC = private defense counsel.

Alaska Judicial Council
Plea Bargaining Re-Evaluation, 1991

exception was Barrow, where both interviewees thought that the case would go to trial. Juneau attorneys agreed fairly well on the sentence the defendant could expect (4 to 6 years), but varied widely on the charges that the defendant was likely to be convicted of.

Bethel was the most consistent community with all but one of the 8 attorneys who responded to the question saying that the charges would be reduced to second degree sexual abuse and that the defendant would probably get a sentence of 1 to 3 years (two did not specify the sentence). The eighth interviewee in Bethel, a private attorney, thought he would take the case to trial. The Bethel interviewees also consistently discussed the effects of a conviction on the village or community from which the offender and the victim came. They tended to justify a reduction in charge and a shorter sentence by reference to community norms, the need of the village and family for the work of the offender, and the ostracism of the victim that was likely to occur if the penalty were perceived by others as too harsh. A former Bethel judge did not entirely approve, although he was aware of those considerations:

I live in an area where sexual abuse of minors is just epidemic and what happens where I am is wholesale charge bargaining. None of these guys ever take a fall for what they have actually done....I have been a little bit exasperated at times to see some of these guys get off as easily as they do....[But] if the guy goes away [to jail] the mother and father starve.

Table 17 shows the actual outcomes of sexual abuse I cases by area of the state for comparison to the interview findings. Reduced and dismissed charges associated with pleas of guilty or nolo contendere rose steadily between 1984 and 1987 in Anchorage. They appeared to drop in Fairbanks, and varied in Southeast, Southcentral, and the Bush. Eight of the ten Southeast interviewees expected the charge to be reduced, but in fact, only about half of the charges were actually reduced for comparable defendants in the 1984 to 1987 database.

TABLE 17				
INCIDENCE OF REDUCED OR DISMISSED CHARGES FOR SEXUAL ABUSE OF A MINOR I CASES				
	1984	1985	1986	1987
Anchorage	47%	53%	65%	67%
Fairbanks	75%	39%	62%	62%
Southeast	[22%]	58%	[56%]	50%
Southcentral	58%	53%	57%	62%
Bush	50%	64%	79%	50%

[] indicate fewer than 10 cases

Alaska Judicial Council
Plea Bargaining Re-Evaluation, 1991

The comparison of the actual case outcomes with the interview findings suggests that some attorneys had a fairly accurate perception of likely case dispositions. In Anchorage, for example, half of the prosecutors who responded to the question thought the case would be reduced; in fact, it was reduced about half to two-thirds of the time. Anchorage defense attorneys and judges, on the other hand, underestimated the chances of a reduced charge. None of the public defenders or Office of Public Advocacy attorneys thought the charge would be reduced.

The Anchorage defense bar did better, however, at estimating the chances of a trial. Four of the public defenders and two private attorneys thought the case would go to trial. None of the prosecutors or judges saw that as a likely disposition. The estimates of trial likelihood (16 to 17%) were within the range of the actual percentages of trials in Anchorage and Fairbanks (see Table 20, Section C, Trials).

The robbery case showed more contrast between Anchorage and Fairbanks in the expected disposition of the charge than did the sexual abuse case (other communities were not used because robbery was such an infrequent offense that the data were insufficient for analysis). Interviewees were better able to estimate the likelihood of a reduced charge. In Anchorage, 46% of those interviewed thought that the robbery I

charge would be reduced; in 1987, 52% of the guilty or nolo contendere pleas to robbery I were associated with cases in which one or more charges had been reduced or dismissed (Table 18). Fairbanks attorneys and judges thought that a reduction in charge was much less likely; only 17% of those interviewed saw it as a good possibility. The data indicated that the chances of a reduction were indeed very low.

TABLE 18				
INCIDENCE OF REDUCED OR DISMISSED CHARGES FOR ROBBERY I CASES				
	1984	1985	1986	1987
Anchorage	44%	15%	37%	52%
Fairbanks	9%	0%	33%	[0%]

[] indicate fewer than 10 cases

Plea Bargaining Re-Evaluation, January 1991

Only one Fairbanks attorney saw any chance at all that the hypothetical case would go to trial, although in both Fairbanks and Anchorage, robbery I cases had trial rates ranging between 11% and 28% between 1984 and 1987 (see Table 20). Finally, 26% of the Anchorage interviewees and 39% of those in Fairbanks thought the case would be referred to the three-judge panel, a possible disposition that was mentioned only rarely in connection with the sexual abuse of a minor hypothetical offense. The preference for referral to a three-judge panel over trial for the hypothetical case was related to the fact that the robbery I defendant was young and had a substance abuse problem.⁶⁹

⁶⁹ A 1985 court of appeals case, *Smith v. State*, 711 P.2d 561 (Alaska Ct. App. 1985), established a non-statutory mitigating factor of potential for rehabilitation that would warrant referral of a defendant to the three-judge panel. The defendants in *Smith* were young men who had committed a robbery, and who were similar in other ways to the hypothetical defendant.

4. Comparison to Other Jurisdictions

A critical criterion for evaluating Alaska's policy prohibiting plea bargaining is whether it produced different results than policies in effect in other jurisdictions. Table 19 shows that the rates of charge reduction in Alaska in 1986 were more similar to those found in jurisdictions with a high rate of guilty pleas than to those with high rates of trials. Table 21 (see Section C, Trials) indicates that Alaska has a high trial rate for filed cases compared to other jurisdictions. The expected pattern would be a high trial rate combined with a low percentage of charge reductions. The pattern found, however, showed relatively high rates of both trials and charge reductions.

TABLE 19				
COMPARISON OF CHARGE REDUCTION RATES				
ALASKA AND OTHER JURISDICTIONS*				
Convicted Cases Only				
(Percent of all guilty and nolo contendere pleas)				
	Alaska¹	Three High Plea²	Five High Trial²	Total, Other Jurisdictions
Pled to top charge	54%	47%	68%	60%
Pled to lesser charge	46%	53%	32%	40%

Alaska Judicial Council
Plea Bargaining Re-Evaluation, 1991

* Data from other jurisdictions is taken from The Prevalence of Guilty Pleas, BJS, 1986.

¹ Alaska data taken from Table 1, supra at 32, for 1984 through 1987 (only Anchorage, Fairbanks and Juneau are included on this table).

² "High Plea" jurisdictions were defined in the BJS report as those with 12 or more pleas of guilty or nolo contendere for every trial. "High trial" jurisdictions had 10 or fewer pleas per trial. The ratio of pleas to trials for Anchorage, Fairbanks and Juneau was 7.0 pleas per trial in 1974-75, the year before the ban. For the same three communities the ratio dropped to 4.3 during the first year after the ban. In 1987, it was up again to 7.3. The data indicate that Anchorage, Fairbanks and Juneau combined would have been considered a high trial jurisdiction even prior to the ban.

By community rather than statewide, however, the data were more similar to the expected picture. Fairbanks had a very high filed trial rate (15% in 1986) and low

percentage of charge reductions (29% in 1986). Anchorage charge reductions (as a percentage of filed cases) were 41% and trials were 9% of filed cases. As the percentage of charge reductions rose, the percentage of trials (per filed case) decreased.⁷⁰

Since Fairbanks was the location in which the policy prohibiting plea negotiations was enforced most consistently and continuously, it was noteworthy that it exhibited the expected pattern of case dispositions. This suggests that the stricter the prohibition of plea bargaining, the higher the rate of trials for filed cases is likely to be. It should also be remembered, however, that Fairbanks has generally had a more adversarial legal culture than other parts of the state. The high trial rate was characteristic of the community even before the local and statewide bans on plea bargaining.

5. Summary

Most attorneys in Alaska agreed that charge reductions and dismissals occurred more frequently in the late 1980s than in the 1970s shortly after the ban on plea bargaining. Many said that charge negotiations currently were used to dispose of the great majority of their cases. The statistical data indicated that in fact, over half (56% to 60%) of the convicted defendants in the 1984 to 1987 database had pled guilty (or nolo contendere) and had had at least one charge reduced or had had one or more charges against them dismissed (Table 10). While charge discussions might have occurred in many (or most) cases, negotiations that resulted in measurable benefit to the defendant apparently happened in about half of the cases.

As will be seen later in the report, attorneys and judges generally agreed that there were very few cases in which binding sentence negotiations occurred, and relatively few in which any sentence concessions were made. Although charge bargaining may have seemed rampant to those within Alaska, it still appeared to affect

⁷⁰ It is worth noting again that screening played an important role in calculation of trial rates. Table 3, supra at p. 34, shows relatively low trial rates for Fairbanks when calculated on the basis of arrested/referred cases.

at most about half the convicted cases. Nine percent of the convicted defendants had been convicted after trial, leaving a full 41% of all convicted defendants who pled guilty or nolo contendere to the original charges against them. The variations in charge negotiations by community reflected the importance of local personnel and customs in the administration of the policy.

Finally, in the context of other jurisdictions, Alaskan communities did not exhibit unusual patterns of case dispositions. Those communities that had higher trial rates for filed cases tended to have lower rates of charge reductions. Guilty or nolo contendere pleas remained the overwhelmingly common mode of disposition and a very sizable minority of defendants appeared to have entered pleas to the original charges against them.

D. Trials

A reward to defendants who waive their rights to trial lies at the heart of any system of plea negotiation... (Alschuler, p.231, Law and Society Review, Vol. 13, No. 2, Winter 1979)

Not until defendants no longer believe on some reasonable basis (such as the opinions of their attorneys or the experience of fellow defendants) that they will be punished more severely for going to trial can it be said that plea bargaining has been genuinely eliminated. (McDonald, p. 102, Plea Bargaining: Critical Issues and Common Practices, 1985)

While the decision to plead guilty or go to trial rests with the defendant, the decision may be affected by the prosecutor's decisions or policies. In theory, a defendant may plead guilty and thereby accept the certainty of a conviction, or he or she may go to trial with some probability of being found innocent and some probability of being convicted.

The defendant's choice of which alternative to pursue depends in part on the probability of conviction if tried and in part on the relative severity of sentence given upon conviction in a trial as opposed to the severity of sentence one would receive upon pleading guilty. (BJS Special Report, The Prevalence of Guilty Pleas, 1984)

The key feature of the elimination of plea bargaining is that we are going to be faced with more trials....Right now, 94% of criminal cases which are filed are plea bargained. We can expect that number to drop substantially with the result that no matter how you analyze it we are going to have to try a great many more cases than we are now trying. (Attorney General Av Gross, memo to prosecutors, July 24, 1975, see Appendix A)

The court system and defense attorneys shared the Attorney General's expectation that the plea bargaining ban would cause more trials. Attorneys throughout the state described case dispositions before the ban in similar terms:

[N]egotiating was almost mandatory. We had so few trials we were afraid of them.⁷¹

Attorneys believed that a defendant who could not negotiate a reduction in sentence in exchange for a plea would choose to take the chance of going to trial. Alaska's earlier report on the effects of the prohibition of plea bargaining found, however, that although both sentence and charge bargaining were sharply curtailed for most cases, many defendants continued to plead guilty or nolo contendere despite the lack of inducements offered by the prosecution or judges.⁷² Commentators have suggested that plea negotiations were simply replaced by implicit concessions from the state such as shorter sentences for defendants who entered guilty pleas.⁷³ Although sentences did tend to

⁷¹ ALASKA BANS PLEA BARGAINING supra note 8, at 11.

⁷² Id. at 152, 239.

⁷³ W. McDONALD, supra note 7, at 103. McDonald says: "Going to trial in Alaska increases the length of one's sentence by 334 percent (cite omitted). What is more, judges, defense counsel, and undoubtedly defendants are fully aware of the existence of this implicit sentencing system." Id. The original article notes that only sentences for fraud offenses were longer by 334% after trial; for violent offenses, the trial differential was greater (445% longer after trial). Rubinstein and White, "Plea Bargaining: Can Alaska Live Without It?", 62 JUDICATURE 267, 278 (1979). For property offenses, however, there was a trial differential prior to the ban of 655% which disappeared in the year following the ban. ALASKA BANS PLEA BARGAINING, supra note 8, at 215.

be shorter for some defendants who pled guilty or nolo contendere, that did not appear to be the whole reason for the prevalence of guilty and nolo contendere pleas.⁷⁴

In spite of these results, many attorneys, even in Alaska, continued to believe that the criminal justice system would be overwhelmed by trials without plea bargaining. Others believed that trials consumed scarce resources that could best be spent on other matters. The data and interview findings in this report suggest that while both views about trials might be correct, the defendant's choice between trial and guilty (or nolo contendere) plea relied on a range of factors. The justice system's avoidance of criminal trials may promote values other than conservation of scarce resources. A non-negotiated guilty or nolo contendere plea may be a legitimate third choice for defendants, along with negotiated pleas and trials.

1. Trial Rates

a. Comparison With Other Jurisdictions. Alaska's trial rate for filed cases was indeed higher than that of many jurisdictions. Table 20 shows that 10% of filed cases went to trial in 1984 and 1985, and 8% were tried in 1986 and 1987. Figure 9 shows the change in trial rates immediately after ban, and indicates that trials in the mid-1980s occurred at about the same rate as during the first post-ban year.

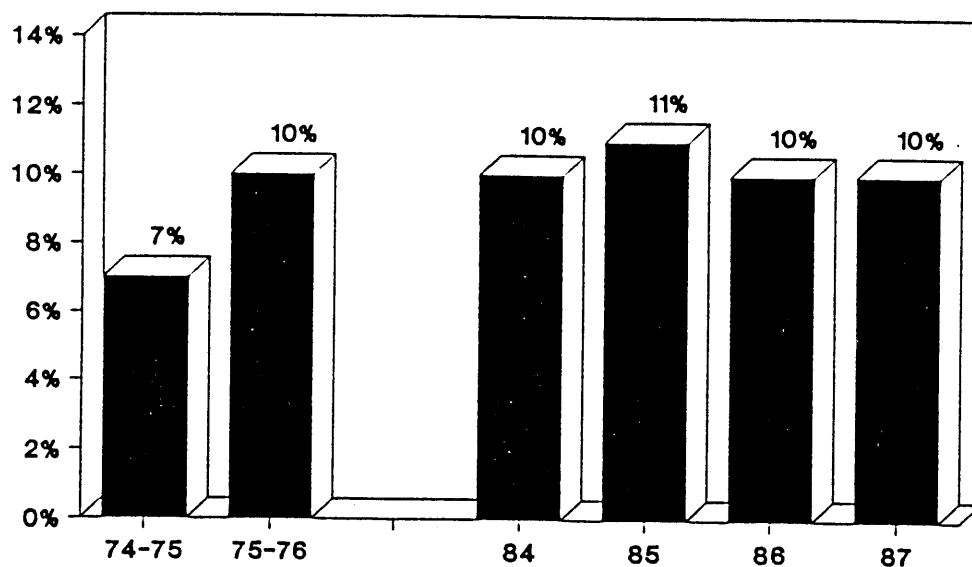
National data on Table 21 show that Alaska was at the high end of the range of trial rates. In 1974-75, the year immediately preceding the imposition of the plea bargaining ban, 7% of all filed cases were tried in Anchorage, Fairbanks and Juneau.

⁷⁴ ALASKA BANS PLEA BARGAINING, *supra* note 8, at 86-88. One attorney in 1978 said: "...[I]f they have the guy cold, as much as the defense bar would like to screw up the system by taking every case to trial, everybody has realized that if the guy is just going to get convicted anyway, because they couldn't possibly bungle it so badly, then you really haven't done your client any service. One judge will punish him because he doesn't think the man should've gone to trial. Other judges will simply have learned more of the facts....So I am not surprised by the continuing rate of guilty pleas. I would not take a case to trial now just for the sake of showing them that I'm going to try all my cases." *Id.* at 82.

TABLE 20						
FILED TRIAL RATE BY TYPE OF OFFENSE						
	1974- 1975	1975- 1976	1984	1985	1986	1987
Statewide			10%	10%	8%	8%
Anchorage/Fairbanks/Juneau	7%	10%	10%	11%	10%	10%
Anchorage	4%	7%	11%	11%	9%	10%
Fairbanks	14%	19%	11%	14%	15%	12%
Southeast			8%	5%	6%	5%
Southcentral			8%	8%	5%	6%
Bush			14%	10%	7%	6%
Statewide, By Most Serious Arrest Charge						
Assault II/III			11%	9%	8%	8%
Robbery I			13%	28%	22%	11%
Theft II			5%	5%	4%	4%
Burglary I			5%	7%	8%	6%
Burglary II			3%	5%	3%	5%
Crim. Misc. II			5%	4%	0%	4%
Forgery II			0%	0%	1%	4%
Sex Assault I			31%	21%	10%	26%
Sex Abuse I			12%	16%	15%	15%
Sex Abuse II			13%	11%	5%	8%
Drugs II and III			5%	7%	6%	6%

Alaska Judicial Council
Plea Bargaining Re-Evaluation, 1991

**Filed Trial Rates
74-76, 84-87
Anchorage, Fairbanks & Juneau**



Alaska Judicial Council/ISER 1990

FIGURE 9

TABLE 21

**TRIAL RATES: ALASKA AND OTHER JURISDICTIONS
PERCENT OF FILED CASES***

Jurisdiction	Trial Conviction	Trial Acquittal	Total Trial Rate
Alaska (State, 1986)	6%	2%	8%
Anchorage, 1986	7%	2%	9%
Fairbanks, 1986	11%	4%	15%
Southeast, 1986	4%	2%	6%
Los Angeles, 1986	4%	1%	5%
Manhattan, 1986	2%	1%	3%
Portland, Oregon, 1986	10%	2%	12%
St. Louis, 1986	4%	2%	6%
San Diego, 1986	2%	0%	2%
Washington, D.C., 1986	5%	2%	7%

* Data for jurisdictions outside of Alaska from The Prosecution of Felony Arrests, 1986, Bureau of Justice Statistics, 1989, Table 11, p. 72.

Alaska Judicial Council, Plea Bargaining Re-Evaluation, 1991

During the year following the ban, trials increased sharply, to 10% of filings. Other available data show that the trial rate rose again in 1977, then leveled off and dropped slightly in 1978 and 1979.⁷⁵

b. Calculation of Trial Rates. Filed cases were used as the basis for calculation of trial rates for most of the discussion throughout the report. It is also useful to consider the relationship of trial rates to screening actions on the part of the prosecutors. Table 22 shows that analyzing trial rates by using the number of arrested defendants produces somewhat different results. When screening rates were low (as during the 1974-1976 years), trial rates based on arrested cases were similar to those found with filed cases. When screening increased, however, the trial rates for filed cases looked very different than those for arrested cases.

Fairbanks had a high trial rate when compared to Anchorage. That observation held true from 1974 through 1976 for both arrested and filed trial rates. In the mid-1980s, Fairbanks screened out a much higher percentage of its cases than did Anchorage. Its arrested trial rate was quite similar to Anchorage's, ranging between 6% and 9% compared to Anchorage's 7% to 8%. However, when filed cases were used as a basis for determining trial rates, the rate was noticeably higher in Fairbanks than in Anchorage (except for 1984). For filed cases, the trial rates were between 11% and 14% in Fairbanks, and between 9% and 11% in Anchorage. Thus, one effect of the intensified screening associated with the ban was to magnify the ratio of trials to filed cases in Fairbanks.

c. Effect of Increased Trials on the Justice System. The number of trials did increase when the plea bargaining ban took effect, and continued to increase for several years thereafter (Figure 10). The criminal justice system appeared to adjust to the increase with relatively little disruption. At least part of this ability to manage more

⁷⁵ T. WHITE AND N. MAROULES, ALASKA FELONY SENTENCES: 1976-1979, at 15, Table II (1980). The percent of convicted charges that were convicted after trial rose from 8.5% in the year preceding the ban to 15.3% in the first year after the ban. In the second year after the ban, the rate was 22.4%. In 1978, it was 21.8% and in 1979 it was 21.2%. Id.

TABLE 22

EFFECT OF SCREENING ON TRIAL RATES

	1974-1975		1975-1976		1984		1985		1986		1987	
	N	%	N	%	N	%	N	%	N	%	N	%
<u>Anchorage/Fairbanks/Juneau</u>												
Total Cases Arrested*	<u>1,143</u>		<u>1,140</u>		<u>2,054</u>		<u>1,848</u>		<u>1,788</u>		<u>1,659</u>	
Screened Out	103	9%	125	11%	678	33%	554	30%	572	32%	514	31%
Total Filed	<u>1,040</u>		<u>1,015</u>		<u>1,376</u>		<u>1,294</u>		<u>1,216</u>		<u>1,145</u>	
Arrest Trial Rate	77	7%	106	9%	144	7%	148	8%	125	7%	113	7%
Filed Trial Rate		7%		10%		10%		11%		10%		10%
<u>Anchorage</u>												
Total Cases Arrested*	<u>723</u>		<u>719</u>		<u>1,203</u>		<u>1,190</u>		<u>1,106</u>		<u>1,039</u>	
Screened Out	80	11%	86	12%	361	30%	309	26%	265	24%	260	25%
Total Filed	<u>643</u>		<u>633</u>		<u>842</u>		<u>881</u>		<u>841</u>		<u>779</u>	
Arrest Trial Rate	32	4%	51	7%	93	8%	97	8%	76	7%	78	8%
Filed Trial Rate		5%		8%		11%		11%		9%		10%
<u>Fairbanks</u>												
Total Cases Arrested*	<u>331</u>		<u>338</u>		<u>651</u>		<u>535</u>		<u>506</u>		<u>456</u>	
Screened Out	13	4%	27	8%	267	41%	203	38%	207	41%	201	44%
Total Filed	<u>318</u>		<u>311</u>		<u>384</u>		<u>332</u>		<u>299</u>		<u>255</u>	
Arrest Trial Rate	45	14%	50	15%	42	6%	46	9%	45	9%	36	8%
Filed Trial Rate		14%		16%		11%		14%		15%		14%

* For the 1974-75, and 1975-76 data, arrested cases includes all defendants arrested for one or more felony charges. For 1984-1987 data, arrested cases include all felonies referred to the prosecutor. In some instances, no one was ever arrested for the offense.

Alaska Judicial Council
Plea Bargaining Re-Evaluation, 1991

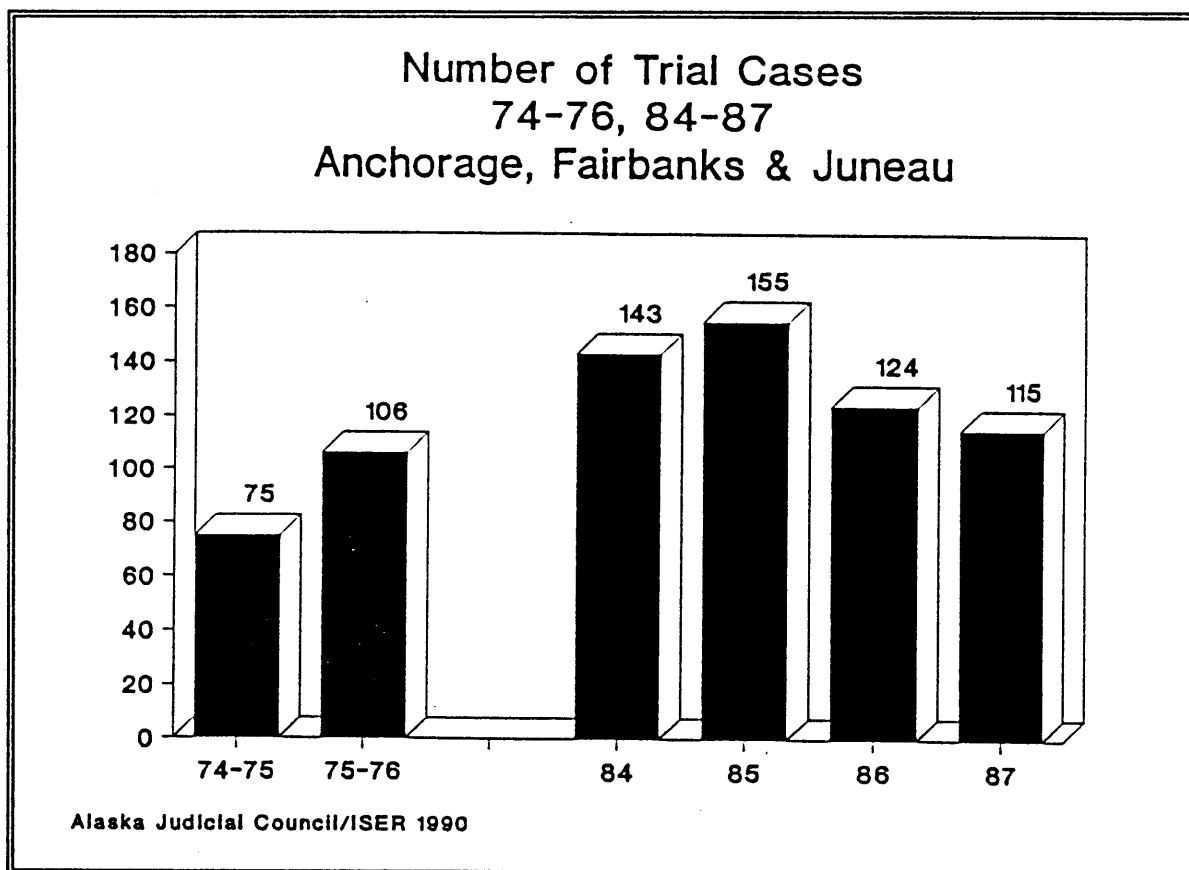


FIGURE 10

- * The relatively low number of trials shown for these three cities for 1987 cases may be related to the fact that 1987 cases still open in mid-1988 were excluded from the analysis. No data were available about the trial status of the excluded cases, but disposition times for trial cases averaged 168 days, compared to 96 days for cases in which a guilty of nolo contendere plea was entered and 131 days for cases in which all charges were dismissed (see Table C-8, Appendix C).

trials was based on the increase in state resources for the justice system. Although the increase in resources was probably more closely related to the population increases during the Pipeline construction, the ban was used often as a justification for higher budgets:

...[T]here was a big increase in the number of trials and an increase of appeals after trial....The biggest impact I

remember was the number of appeals,⁷⁶ not the number of trials. The ban was great as far as a budget because I could moan and groan about the burden of the ban and the legislature would listen. We did increase our staff....Because we had lots of money the number of law enforcement people increased as did the number of cases. (Former Anchorage District Attorney)

Table 23 shows that the ratio of judges in Anchorage, Fairbanks and Juneau to the actual number of trials in those communities increased substantially after the imposition of the ban.⁷⁷ The addition of new judges, a few in the late 1970s and several in the early 1980s, reduced the ratio. More importantly, the declining number of trials in 1986 and 1987 brought the ratio down to below pre-ban levels.

The table also shows the caseload per judge for the three major categories of superior court cases combined: criminal, domestic and "other civil" filings. Caseloads per judge were much higher immediately after the ban. The increase came in civil cases which rose by 15%; felony filings were lower in 1975 than in 1974. By the mid-1980s, judges had a lower trial ratio than in 1975-76 but their overall caseload was rising. However, both felony trials and the overall caseload began to drop in 1986 and 1987, easing some of the perceived pressure. The ban was probably responsible for some of

⁷⁶ The number of appeals did increase significantly, as noted in a recent article on appellate review of sentencing:

Thirty-two sentence appeals were filed in 1976, a thirty-nine percent increase from the previous year. In 1977, the number of sentence appeals jumped to sixty-three, a 103% increase from the previous year. (Citation omitted)

The author attributes the increase to the ban, noting that, "...the ban effectively increased the number of defendants able to file sentence appeals by decreasing the number of defendants who had agreed to their sentences in exchange for a plea." Di Pietro, "The Development of Appellate Sentencing Law in Alaska," 7 ALASKA L. REV. 265, 274-75 (1990).

⁷⁷ The Alaska Court System reports show felony trials statewide at 65 in 1975, 136 in 1976, peaking at 166 in 1978 and dropping to 127 in 1979. From there they increased again gradually until 1985. As a percent of all felony dispositions (a different database than the one used in the present report), trials were 10.1% in 1975, up to 22.0% in 1978, and down to 13.0% in fiscal year 1984 (the reporting year for the courts changed in 1980).

the 1975-76 increase in trials and the relaxation of the ban may have been related to the declining number of trials after 1985.⁷⁸

<p align="center">TABLE 23</p> <p align="center">RATIO OF JUDGES TO FELONY TRIALS</p> <p align="center">Anchorage, Fairbanks, Juneau only</p>						
	1974- 1975	1975- 1976	1984	1985	1986	1987
N of Trials	75	106	143	155	124	115
N of Superior Court Judges	11	11	18	18	18	18
Trials per Superior Court Judge	7.0	9.6	8.0	8.2	6.9	6.3
Average N of cases/judge (civil and criminal)*	700	805	872	955	909	842

* Civil cases include domestic relations and other civil case filings as reported in the court system's annual reports for the appropriate years. Probate and children's matters are excluded. Criminal cases include all criminal matters filed in superior court.

Alaska Judicial Council
Plea Bargaining Re-Evaluation, 1991

Other criminal justice agencies experienced increases in resources during the middle 1970s that enabled them to keep up, for the most part, with more trials (Table 24). Although agencies often attributed the need for additional funds to the ban, several attorneys and police officers interviewed for this study recalled the main reasons for obtaining those funds as being more closely related to the construction of the Alaska Pipeline:

⁷⁸ Trials dropped in 1988, as shown by court system data from the court's annual reports. The reported number of felony trials in FY'87 was 215 (9% of dispositions), in FY'88 it was 173 (7% of dispositions), and in FY'89 was 190 (8% of dispositions).

<p style="text-align: center;">TABLE 24</p> <p style="text-align: center;">OPERATING BUDGETS</p> <p style="text-align: center;">STATE CRIMINAL JUSTICE AGENCIES,* 1977-1989</p> <p style="text-align: center;">(In Thousands of Dollars)</p>					
Year	Dep't of Public Safety	Dep't of Adult Corrections	Adjudication (Courts)	Public Defender/	Dep't of Law/ Prosecution
1977	\$19,735.7	\$13,954.2	\$17,689.5		\$ 3,004.0
1978	22,256.4	16,598.2	18,692.5		3,591.9
1979	25,641.3	18,636.3	20,750.9	2,304.7	3,991.5
1980	25,961.5	21,599.0	23,487.1	2,649.2	4,686.5
1981	29,822.1	24,841.5	26,518.2 (19,897.6 authorized)	3,113.1	5,688.7
1982	38,616.9	32,921.6	30,009.4	3,525.1	6,988.9
1983	40,988.8	40,121.1	34,349.6	4,261.9	9,561.8
1984	41,179.7	57,849.1	36,960.0	4,820.3	9,288.7
1985	42,909.5	71,497.2	38,249.8	5,320.5	11,288.0
1986	44,201.8 (authorized)	78,470.6	39,003.9	5,834.1	10,672.0
1987	38,790.7 (authorized)	78,291.4	35,851.9	5,834.1	10,134.0
1988	40,381.3	84,935.2	37,306.1	6,138.0	9,687.0
1989	40,509.3	94,624.3	38,561.7	6,317.6	10,380.0

* Figures are actual amounts except where authorized budget figures are noted.

Sources: Dep't of Corrections, Annual Reports
Alaska Court System, Annual Reports
Criminal Justice Working Group
Department of Public Safety
Public Defender Agency
Department of Law

Alaska Judicial Council
Plea Bargaining Re-Evaluation, 1991

Staffing levels, facilities and equipment did not change as a consequence of the ban. Union representation [many police departments became unionized in the middle 1970s], money, more resources, increases in population and increased demand brought about these changes. (State Trooper)

Increased training resources were available.... The Pipeline brought lots of money; jurisdiction increased. Before we became Teamsters I was making \$6.00 per hour. Afterwards with new wages we got lots of good recruits who were interested in the money. (Anchorage Police officer)

...[I]n 1976 there was a backlog not because of the plea bargaining but because of the Pipeline. In 1976 the Pipeline was starting to wind down. The presiding judge changed the calendaring system to better handle the caseload and allowed no continuances. As a consequence of the aggressive management of the calendar and a new Fourth Judicial District position [a Superior Court judgeship for Bethel] all criminal cases were resolved well within the 120 day rule. So it's hard to say what effect the ban had in relation to the load related to the pipeline cases. (Fairbanks judge)

It was one of the curses of money that Alaska could afford this ban. (Anchorage defense attorney)

More recently, the ban again was viewed as a costly burden on the justice system. During the early 1980s, increasing prices for oil worldwide brought dramatic increases in Alaskan revenues. Budgets for criminal justice agencies that had been increasing gradually throughout the '70s jumped by 50%, or more (Table 24). However, oil prices plunged in the mid-1980s, and the loss of revenues combined with the collapse of an overbuilt real-estate market in Anchorage, the Mat-Su valley and Fairbanks severely strained the state's budget. Table 24 shows declining funds for prosecution, Public Safety (Troopers), and the courts during FY'86, '87 and '88. Some attorneys suggested that returning to plea bargaining was the best answer to the justice system's revenue problems. The extent to which lawyers believed this would improve justice system efficiency gives some indication of the extent to which they believed that the ban was still driving the criminal justice system:

You could cut the criminal justice system in half if you had defense attorneys and prosecutors who could resolve cases by plea bargaining, assuming both sides have trust and integrity. (Defense attorney)

[The Attorney General in 1986] was under huge pressure to do something about the court load and corrections....He heard early on that we were trying too many cases in Anchorage; he also was getting the...numbers about the huge increase in corrections. He said, 'OK, you can do sentence recommendations, if the sentence would be the same as after trial.' (Former prosecutor)

The ban is silly and a waste of resources. There are needless trials...I'd do away with it and go back to the old system...If we did this, you could reduce the size of the DA and PD staffs and private attorneys would become more involved with the system. (Private defense attorney)

d. Summary. Trial rates did increase after the plea bargaining ban was imposed. However, the extent of the increase was less than many had expected, and the resulting disruption to the criminal justice system was not as substantial as had been feared. Although some suggested that civil cases suffered delay as a result of the priority given to criminal trials, the court system appeared to be able to manage those problems as well.⁷⁹ One of the longest-standing fears about the effects of a ban on plea bargaining⁸⁰ seemed, at least for Alaska, to be countered by the actual results of the experiment. The persistence of the belief that plea bargaining saves resources,

⁷⁹ In an Anchorage Daily News article dated May 22, 1978, the court's Administrative Director Arthur Snowden said, "If you want a quote, here it is: 'There is no crisis in the courts.'" The article continued: "Snowden said some civil attorneys are upset that their cases are not getting to trial as rapidly. He said resources have been diverted for the trying of criminal cases. The ban [on plea bargaining] led to a 200 percent increase in criminal trials.

"Civil cases are certainly moving more slowly," he said. In response to reports of a 'critical backlog' of civil cases, he said, 'It may take three or four months more time to process civil cases.'"

⁸⁰ "The negotiated plea serves important functions....The quality of justice in all cases would suffer if overloaded courts were faced with a great increase in the number of trials." THE NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS 45 (Joseph Foote, ed. 1973) quoting PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF CRIMINAL JUSTICE, TASK FORCE REPORT: THE COURTS. 135 (1967).

however, is sufficiently strong to overcome the findings that the two are not necessarily related.

2. Reasons for Trials

In Alaska, as in other jurisdictions, the majority of offenses were not tried, even after the ban and after the addition of presumptive sentencing for first felony offenders in Class A offenses. Why did not more defendants go to trial and take the chance of acquittal? Although conviction rates at trial were high for most offenses (about 75% statewide), they varied greatly by year, offense and area of the state, suggesting that some types of offenders might find it more worthwhile to go to trial. Despite what appeared to be strong arguments for a high number of trials, Table 25 shows (for only cases in which a conviction occurred), that even the most serious offenders were convicted on plea of guilty or nolo contendere over three-quarters of the time. Defendants originally charged with an unclassified offense were convicted after a plea of guilty or nolo contendere 79.2% of the time, and those originally charged with a Class A offense were convicted after a plea 78.8% of the time.

Commentators have suggested that prosecutorial or judicial inducements or coercion are primarily responsible for defendants' choices to plead guilty or nolo contendere rather than go to trial.⁸¹ Interviews with defendants and attorneys, however, suggested that no one factor could adequately explain the decision. Attorneys were asked two different questions in the interviews conducted for this study: first, how much they thought that defendants benefitted from a typical plea negotiation, and second, whether they thought that defendants either benefitted by pleading guilty or nolo contendere or were penalized for going to trial. Defendants were asked why they pled guilty or nolo contendere and whether they thought they would have received a better sentence had they gone to trial.

⁸¹ Callan, "An Experience in Justice without Plea Negotiation," 13 LAW AND SOCIETY REVIEW 327, 333 (1979).

<p align="center">TABLE 25</p> <p align="center">CONVICTIONS BY TRIAL VS. PLEA</p> <p align="center">Convicted Cases Only, 1984 - 1987</p>					
Original Offense Class	Plea		Trial		Total N
	N	%	N	%	
Unclassified	546	79.2%	143	2.08%	689
Class A	428	78.8%	115	21.2%	543
Class B	1786	92.2%	151	7.8%	1937
Class C	3058	95.1%	159	4.9%	3217
All Offenses	5818	91.1%	568	8.9%	6386

Alaska Judicial Council
Plea Bargaining Re-Evaluation, 1991

The most notable finding in the defendant interviews was the large number who had had second thoughts about their guilty or nolo contendere plea and who believed at the time of the interview that they would have been better off going to trial. Of the 29 defendants interviewed, only two had actually gone to trial. Fourteen of the remaining 27, or just over half, thought they would have received a better sentence (or possibly been acquitted, although most weren't that optimistic) had they taken their case to a jury. In general, the defendants who thought they would have done better at trial appeared to believe that more of the facts of the case would have come out and that those facts would have benefitted them. Many of the defendants held this belief despite the fact that they also said their attorneys had advised them not to go to trial for a variety of reasons.

I was told by my lawyer that pleading no contest was in my best interest. I did not know that by pleading I was facing an eight year presumptive....[If I had gone to trial]...I would have brought out some things that really happened and I think it would have made a difference to the jury. (Defendant convicted of Sexual Abuse of a Minor, first degree)

[I decided not to go to trial] because the tapes of phone calls and buys recorded were incriminating. I was guilty. I was discouraged because the evidence against me was so great. I believe I would have gotten a longer sentence....I got eight years. I had a drug habit. I sold because of my habit and not because I was in it for the business. I might have gotten a better sentence if I had gone to a jury trial. My sentence is being appealed. (Defendant convicted of five counts of drug-related charges; actually required to serve only four years)

[I decided not to go to trial because] I thought I would lose. I was caught in the act and I was guilty....Possibly [I would have gotten a better sentence if I had gone to trial] because I would have been found guilty, but a lot of the facts of the case that would have worked in my favor would have come out. My co-defendant got off better than I and was not required to pay restitution. (Defendant convicted of eight property offenses)

[I decided not to go to trial because] I could not get help from my attorney....I think [I would have gotten a better sentence after trial]. I think that if they had listened to everything I would have gotten a more fair sentence. My sentence was very unfair. (Defendant convicted of Sexual Abuse of a Minor, first degree, plus 2 related offenses)

Some attorneys agreed with the defendants' perceptions that trials could work in the favor of particular defendants. Their assessment of that possibility depended on both their job (prosecutors were less likely to think that trials favored defendants) and on their location within the state (Fairbanks attorneys were less likely to mention the possibility of benefit). One judge estimated that two-thirds of the time going to trial worked against the defendant; one-third of the time it favored the defendant. An Anchorage assistant district attorney described several reasons why a defendant might receive a lower sentence after trial:

If you have an assault where the victim started it, or is an obnoxious character, the judge may have sympathy for the defendant. That might lead to the prosecutor reducing the charge, or if the defendant goes to trial, it could lead to a lighter sentence. Or maybe the victim is insisting the harm is greater than the judge thinks it really is, or both parties

were drunk or using drugs. The judge gets a better sense of all these things at trial. So even if the attorney knows the defendant will be convicted, sometimes it's worth it to go to trial.

More typically, defendants said their attorneys had advised them against going to trial because of the possible harm at sentencing:

I did not know much about the system. I just listened to the lawyers; they told me I could get more time if I went to trial....I was afraid of going to trial....If I had gone to trial, I might have gotten it down to negligent homicide. (Defendant convicted of Manslaughter and Failure to Stop)

I wasn't too sure. I was new to law. My attorney advised me to plead. (Defendant convicted of attempted drug sale and bootlegging liquor)

My attorney convinced me to plead. Because my attorney said that I'd get a longer sentence if I went to trial....I think that if I had had a real attorney who was not afraid to speak out in court, I'd have received a better sentence. (Defendant convicted of Attempted Misconduct Involving a Controlled Substance, Third Degree)

My [lawyer] advised me that it would not be wise to go to trial. I was advised that I would likely end up with more time if I did go to trial....I had three mitigators, but the [attorney] did not bring them out because he didn't feel they were strong enough....If I had gone to trial, I could be out right now, if the mitigators had been accepted. I am working on a post conviction relief right now, ineffective assistance of counsel. I am doing it on my own. I believe the [attorney] just wanted to deal the case. (Defendant convicted of two counts of Sexual Assault, First Degree; Kidnapping and Robbery charges were dropped)

A theme of these defendants' remarks seemed to be that they disagreed with their attorneys' advice. Other defendants, who phrased their responses in a way that indicated more personal responsibility for the decision to plead guilty, showed similar recognition of the possible consequences of trial, without blaming the attorneys:

I didn't get along with [the judge]. I had to consider that if I went to trial and was found guilty...I would have gotten a longer sentence. [I wouldn't have gotten a better sentence after trial]...because I would have been found guilty of all the charges....I wanted to serve my time, and was willing to remain incarcerated longer in lieu of probation. I don't do well on probation. (Defendant convicted of Burglary I)

I didn't want to hurt the victims by putting them through trial....I was satisfied with the judge's sentence....I truly believe that if a person had had that [the treatment program that the defendant was in] when they were young, it would have helped and maybe all this would not have happened. (Defendant convicted of Sexual Abuse of Minor, First Degree)

[I didn't go to trial because] I just wanted to get it all over with and get the time done....What I hear, it is harder on the judge when you go to trial. I don't want to make it harder on the judge because he might make it harder on me. (Defendant convicted of forgery)

They gave me a better deal [for not going to trial]. I knew I would be convicted, regardless....I think the judge knew what he was doing. I admitted to the offense and they had the stolen goods. The only charge that I would not agree to plead to was the Assault charge. Ultimately, the state agreed to drop that charge. (Defendant convicted of property crimes)

A majority of the attorneys and judges believed that defendants who did get longer sentences after trial, received them either because the defendant had committed perjury or because the facts that had come out at trial made the defendant appear worse. To some extent, defendants also perceived the possibility that trial witnesses or facts could work against them:

There were two witnesses in my case. Just before we were ready to go to trial, one of the witnesses came to me and told me he was going to change his story at trial. I did not know what he was going to say...and was afraid it might tip the scales against me. (Defendant convicted of Murder, Second Degree)

Too many people had turned on me, saying that I was guilty of the burglary charge. I didn't want to risk going to trial on the burglary charge. (Defendant convicted of two counts of Theft, Second Degree)

Attorneys and judges confirmed the views of these defendants:

If the defendant is a poor witness or lies, it will affect the judge. The judge sees it all live and in color, and he has a greater feeling for the plight of the victims. The judge cannot help but to be affected by that. On the other hand, the defendant might portray himself to be more stupid than sinful; it might affect the judge the other way, but that occurs in a minimal number of cases. (Fairbanks prosecutor)

At trial the judge has watched the defendant squirm through trial; has watched the defendant have to listen to the victim. (Bethel public defender)

I know the statistics say they do. I don't think you get an increased sentence in Juneau if you go to trial. The statistics are nationwide. A defendant can get a greater sentence because the judge has more facts on which to base the sentence, but it is not punitive. (Juneau prosecutor)

Greater exposure to the facts of the case was one reason suggested for longer sentences following trial; the other very frequently stated reason was perjury. However, it was not always the crime of perjury that was perceived as the problem--perjury was more often seen as the defendant's lack of readiness to be rehabilitated:

Superior court judges hold sacrosanct the defendant's right to go to trial, and do not punish the defendant for going to trial....Most sex offenders who go to trial are still in denial. Case law talks about the possibility of rehabilitation and if the defendant is in denial one can weigh that against his prospect for rehabilitation. The result is a longer sentence. (Anchorage prosecutor)

Judges are fair in that respect. We used to call it 'paying rent for the courtroom.'...There is, however, a tendency for a

defendant in denial or one who perhaps lies on the stand, to alienate the judge. As a general rule, Alaska provides free courtroom time. (Palmer public defender)

It is possible that the defendant receives a longer sentence if she or he chooses to go to trial. I am aware that we cannot consider that but sometimes at sentencing we are locked into that. We are faced with a defendant in denial and showing a lack of remorse, or the defendant who perjures himself. It is the position the defendant takes at trial, not the actual going to trial, that is considered. (Fairbanks judge)

3. Trial Differentials or Tariffs

The interview findings suggested that many, but not all, defendants stood a chance of receiving a longer sentence after a trial. This differential between sentences imposed after trials and those imposed after pleas remains one of the more controversial aspects of criminal justice.⁸² The existence of a differential is taken by some as prima facie evidence of plea bargaining.⁸³

Past Judicial Council studies have consistently shown the existence of trial/plea sentence differentials, or "tariffs,"⁸⁴ for some types of offenses. Most attorneys and judges interviewed for the present study, however, said that even though a defendant might receive a longer sentence after trial, that there were no trial tariffs. The decision was made to conduct an extensive analysis of possible differences between plea and trial sentences to try to resolve the issue.

⁸² Alschuler, "Plea Bargaining and its History," 13 LAW AND SOCIETY REVIEW, 211, 242 (1979).

⁸³ McDonald, "From Plea Negotiations to Coercive Justice: Notes on the Respecification of a Concept," 13 LAW AND SOCIETY REVIEW 385, 386 (1979).

⁸⁴ Professor Franklin Zimring, U.C. Berkeley Boalt Hall School of Law, suggests the term "tariff" to reflect the cost/benefit analysis undertaken by many attorneys when weighing the pros and cons of the decision to go to trial.

The analysis of trial tariffs was separated into two components: the chance that a given offender would be sentenced to incarceration rather than probation (the "in/out" decision) and the mean active sentence length. Following several preliminary analyses, the decision was made to confine the discussion of trial tariffs to eleven relatively common specified offenses. Analyses pertaining to groups of offenses tended to yield spurious results due to large variations in sentencing practices among individual offenses.

The likelihood of receiving an active jail sentence appeared to be greater for trial convictions for seven of the eleven offenses examined (see Table 26). Seven of the eleven offenses (but a different subset) were also associated with mean sentences for trial cases of at least 20 percent greater than for pled cases. Without taking into account possible differences in the makeup of pled versus trial defendants, then, there was evidence of a trial tariff for some, but not all, of the offenses examined.

TABLE 26 SENTENCES FOR SELECTED OFFENSES BY TRIAL VS. PLEA All Cases Statewide						
Offense	Percent "In"			Mean Active Time of Those "In" (Months)		
	Plea	Trial	No. of Trial Cases	Plea	Trial	No. of Trial Cases
Assault II	87%	86%	(14)	22	33	(12)
Assault III	77%	85%	(47)	15	18	(40)
Robbery I	98%	94%	(33)	84	99	(30)
Burglary I	70%	83%	(30)	26	42	(25)
Burglary II	65%	88%	(17)	17	29	(15)
Theft II	55%	88%	(25)	14	17	(21)
Crim. Misc. II	66%	100%	(4)	15	17	(3)
Forgery II	57%	100%	(5)	20	25	(5)
Sexual Assault I	94%	92%	(47)	90	138	(43)
Sex Abuse I	99%	97%	(32)	87	118	(31)
Sex Abuse II	82%	96%	(25)	28	37	(24)

Alaska Judicial Council
Plea Bargaining Re-Evaluation, 1991

Defendants who chose to go to trial tended to differ from defendants who pled, however. They were more likely to have prior felony records, were more likely to be at least 30 years old and male, were more likely to be represented by a private attorney, and were more likely to have been detained before trial (see Table 27). The existence of trial tariffs, then, could not be assumed from a simple comparison of case outcomes.

As noted earlier, the examination of trial tariffs is best confined to individual offenses. The number of trial convictions by individual offense in the sample subset was insufficient to sustain an analysis that attempted to control for defendant and case differences. It was therefore necessary to return to the universe of cases and accept the limitation of the defendant characteristics included in the database: presumptive sentence status, number of prior felonies, and number of convicted charges. These variables were first used in a series of Logit analyses to estimate the effect of a trial versus plea conviction on the likelihood of receiving an active sentence. The same variables were then used in multiple regression analyses to estimate the effect of a trial versus plea conviction on active sentence length.

Five offenses included sufficient numbers of trial convictions and sufficient variance in the "in/out" decision to be included in the logit analyses. Two of the five offenses (Theft II and Drugs III) showed evidence of a trial tariff. The conditional effect on receiving an active sentence by going to trial was 89% compared with 60% for the average of all defendants convicted of Theft II. Similarly, the conditional effect of going to trial was 93% compared with 70% for the average of all defendants convicted of Drugs III. In neither case, however, did the combination of presumptive status, prior felonies, number of convicted charges and trial versus plea status explain a substantial proportion of the variation in the in/out decision (the two logit models explained only 14% and 23% of the variance in the in/out decision for Theft II and Drugs III respectively). This suggested that other unspecified factors accounted for much of the apparent difference in the in/out decision. Even the modest trial tariff effect in two of

TABLE 27

CHARACTERISTICS OF PLEA VERSUS TRIAL DEFENDANTS

Data Subset: 1986-1987 Only

	Plea	Trial
Sentence		
None/Prob./Fine Only	36%	10%
Under 3 months	47%	29%
3+ months	<u>17%</u>	<u>61%</u>
	100%	100%
Number of Cases =	892	102
Most Serious Charge Reduced		
No	54%	79%
Yes	<u>46%</u>	<u>21%</u>
	100%	100%
Number of Cases =	893	123
Prior Felony Record		
No prior felony convictions	74%	58%
One felony conviction	16%	22%
Two felony convictions	7%	10%
Three + felony convictions	<u>4%</u>	<u>10%</u>
	100%	100%
Prior Misdemeanor Record		
No prior misd. convictions	36%	33%
One misd. conviction	16%	24%
Two misd. convictions	12%	7%
Three + misd. convictions	<u>37%</u>	<u>35%</u>
	100%	100%
Age of Defendant		
Under 30	68%	52%
30 and over	<u>32%</u>	<u>48%</u>
	100%	100%
Gender of Defendant		
Male	90%	96%
Female	<u>10%</u>	<u>4%</u>
	100%	100%
Detained Pretrial		
No/unknown	51%	39%
Yes, 1-29 days	19%	9%
Yes, 30+ days	<u>30%</u>	<u>52%</u>
	100%	100%

TABLE 27 (Continued)		
CHARACTERISTICS OF PLEA VERSUS TRIAL DEFENDANTS		
Data Subset: 1986-1987 Only		
	Plea	Trial
Arrested on Date of Offense		
Yes	46%	46%
No	<u>54%</u>	<u>54%</u>
	100%	100%
Type of Defense Attorney		
Public Defender	70%	51%
Office of Public Advocacy	13%	14%
Private Attorney	15%	29%
Court Appointed	2%	6%
Pro Se	<u>1%</u>	<u>--</u>
	100%	100%
Class of Most Serious Arrest Charge		
Felony or misdemeanor	2%	2%
Class C	50%	30%
Class B	30%	20%
Class A	9%	23%
Unclassified	<u>9%</u>	<u>25%</u>
	100%	100%

Alaska Judicial Council
Plea Bargaining Re-Evaluation, 1991

the five offense categories examined may have been an artifact of the limited information available on the differences between pled and trial cases.

The same five offenses and Sex Abuse I were examined for variations in active sentence length using multiple regression. In two instances, Sexual Assault II and Drugs III, plea versus trial status showed a significant effect on sentence length. The estimated errors associated with these effects were large, however, again suggesting that more information was needed before even these apparent indications of trial tariffs could be accepted at face value.

In an effort to compensate for the lack of data in the computer database, the decision was made to undertake a case audit of selected trial and plea cases to see

whether details in the case files clarified differences between plea and trial sentences. Twenty-one trials and twenty pleas, all from Anchorage, were examined. All defendants were male, to reduce the possible sources of discrepancies in sentences. About one-third of each group were convicted of Assault II, one-third of Burglary I, and one-third of Theft II.

The cases were analyzed to determine whether there were clear differences among the defendants in the reasons for choosing trial instead of pleading. It was hypothesized that there would be a strong relationship between the reasons for going to trial and the reasons for giving the defendant a certain sentence if he were convicted. Among the property offenders, a slight majority of those going to trial faced presumptive sentences; for the Assault II offenders, presumptive did not appear to have been the deciding factor in going to trial. The trial defendants also often had serious misdemeanor records. However, beyond the defendant's prior record and possibility of a presumptive sentence, the reasons for choosing trial were less clear. Often the defendant either seemed to be gambling on his chance of acquittal or to desire vindication because in his view the prosecution was unjustified.

There were clearer reasons for pleas. Five of the six Assault II offenders had originally been charged with Assault I, and had been offered the opportunity to plead to the lesser offense. The sixth had two other assault charges against him dropped. In all fairness, it should be noted that in two of the six Assault II cases that went to trial the prosecutor also had reduced the charge to Assault II from a higher offense and the defendant still went to trial. Three of the seven Theft II cases that pled had started as robbery cases; one of the tried Theft II cases had also started as robbery and been reduced by the prosecutor prior to trial. In several cases, charges had been dismissed.

The review of sentences was inconclusive. The sentences imposed after trial did not appear to be substantially different from those imposed after plea. The differences that did occur appeared to be related to the defendant's prior record (whether of felonies or misdemeanors), to his denial of responsibility for the offense (often in the face of

overwhelming evidence), or to the seriousness of harm done to the victim. There did seem to be some relationship between the defendant's initial reasons for choosing trial and the sentence later imposed.⁸⁵

Despite the limitations imposed by a lack of data, it seems safe to conclude that there is no evidence of a widespread trial tariff. Differences may indeed exist for individual offenses. Viewed from the perspective of a defendant and a defense attorney, however, there appears to be no justification for a blanket avoidance of trials based on the view that there is a penalty reflected in the length of sentence received.

The case audit and interviews strongly suggested that the differences between sentences imposed after trial and those imposed after plea were primarily the result of factors considered legitimate by most attorneys and judges, rather than being "tariffs" exacted for exercising the right to trial or rewards for pleading guilty. Such factors included the defendant's prior history of convictions (often for similar offenses), harm to the victim, and the defendant's persistent denial of responsibility. Thus, the statistical evidence of trial/plea sentence differentials does not permit the conclusion that these differentials were a major factor in inducing guilty pleas.

⁸⁵ See however, the judge's remarks in *Pears v. State* 698 P.2d 1198, 1201 n. 4 (Alaska 1985). The defendant had been convicted after trial of Murder II in a vehicular homicide case. The judge said: "...[T]he court will certainly not penalize him for not admitting the offense of second degree murder, particularly when there was an indication that he would have entered a plea to a manslaughter-type offense. The court certainly would not penalize him for that. Certainly, since the outset, Mr. Pears has been willing to accept his guilt of the offense but not the degree with which he was found guilty by the jury." The judge imposed a sentence of 20 years on each of two counts of Murder II (concurrent) and a 5-year sentence on Assault II (also concurrent). The Court of Appeals affirmed the sentence, on the grounds that it was not "out of line with other sentences which have been imposed for murder." *Pears v. State*, 672 P.2d 903, 912 (Alaska Ct. App. 1983). The Supreme Court compared the sentence to those imposed for manslaughter, however, and found 20 years to be "clearly mistaken" *Pears*, 698 P.2d at 1205.

4. Perceptions of Trial Differentials

Trial/plea sentence differentials are often seen as an indication of implicit plea bargaining:

Even if no offer is made by the state but a defendant reasonably believes there is differential sentencing, his guilty plea would constitute a bargain. By this definition plea bargaining is not necessarily eliminated if the prosecutor ceases to offer concessions in exchange for pleas....[T]here is still plea bargaining as long as defendants continue to believe reasonably that they will be treated more harshly for going to trial and therefore plead guilty.⁸⁶

It was apparent from the interviews of defendants, attorneys, and judges that many participants in Alaska's justice system believed that no trial tariffs existed (although one Anchorage defense attorney who firmly believed that there were no trial tariffs estimated that the average defendant would save a year in jail by pleading guilty). Half the defendants who pled guilty thought later that they would have been better off had they gone to trial, even though at the time they pled many of them thought they were avoiding a longer sentence or conviction on more charges. Most of the attorneys and judges who thought that sentences might be longer after trial gave as reasons either the defendant's perjury or the judge's opportunity to see more of the facts of the case. For the most part, attorneys did not think that defendants were penalized just for going to trial. Nor did many attorneys believe that defendants were rewarded for pleading guilty, unless in a particular case the judge took the plea as an indication of remorse. However, attorneys continued to advise defendants that their chances of a heavier sentence after trial were good when the attorneys believed that a trial would not be the to the defendant's advantage.

⁸⁶ McDonald, supra note 83, at 388.

To further emphasize the point that they did not believe that defendants were penalized for going to trial, some attorneys and judges discussed the situations in which trials could benefit defendants:

It all depends upon the evidence. If you have a sympathetic jury, it could work in their favor. (Anchorage judge)

If a client testifies and is a complete jerk, that can have an ill effect on the judge. But in a burglary or other unemotional case, no [longer sentence after trial]. (Anchorage public defense attorney)

Judges understand the adversary system and do not hold it against a defendant if he decides to fight the charge. (Anchorage private attorney)

...[S]ometimes it works the other way...the judge may see your client more as a human being and that can work in his favor at sentencing. (Anchorage private attorney)

A defendant open to rehabilitation who goes to trial is not likely to be affected. (Palmer prosecutor)

In district court they go the other direction in an effort to give the message that the defendant is not being penalized for going to trial. (Juneau prosecutor)

[Going to trial]...is not supposed to impact the sentence, but it does, but not significantly. There are exceptions to that rule--cases in which evidence at trial will show his guilt, but the evidence will show the defendant in a favorable light--in those instances there is a benefit to the defendant for going to trial. (Fairbanks public defense attorney)

[I]t can also cut the other way. If the trial shows there was no provocation to commit the crime, but the defendant gives the judge a better understanding of how the incident happened, it may work in his favor. (Bethel private attorney)

The interviews indicated that many attorneys, judges and even defendants did not perceive a trial tariff. When the current study began in 1988, members of the project's advisory committee who headed state criminal justice agencies insisted that there were no trial tariffs in Alaska despite consistent evidence from past Judicial Council studies

that sentences after trials were longer for many types of offenses. The interview findings supported the hypothesis that significant trial tariffs did not exist in the 1984-1987 period and that plea/trial sentence differentials could usually be explained in individual cases by factors in the case itself.

Professor McDonald suggests that the perceptions of trial tariffs or sentence differentials are at least as important as the reality:

...[I]t is the perception of the actors in the system that govern their decisions. The advice given by attorneys to the defendants, the willingness of defendants to plead, and the relative strengths of the positions of prosecutors and defense attorneys in plea negotiations are all influenced by perceptions about differentials.⁸⁷

The Alaskan criminal justice system appeared to be operating, at the time of this report, under a widely-shared perception that defendants were not penalized just for going to trial. However, judges and attorneys agreed that many defendants would receive a longer sentence after trial, because the defendant was perceived to have perjured himself, to lack remorse, or because the facts of the case were presented to the judge in more vivid detail. Defendants themselves appeared to believe on the contrary, at least half the time, that although their attorneys may have advised them to avoid trial they would have been better off had they had a chance to tell their story. If it is the actors' perceptions that are the critical factor in determining whether the system implicitly coerces pleas, then the conclusion must be that pleas were not being coerced, but resulted (in general) from a perception in each individual case that the defendant gained more by pleading. The perception by many attorneys that plea/trial differentials did not exist may be evidence that the ban on plea bargaining was partially effective in truly reducing the amount of both implicit and explicit plea negotiation.

⁸⁷ W. McDONALD, supra note 7, at 97.

5. Other Factors in Avoiding Trials

The discussion of trial differentials should not obscure other reasons for avoiding trials. Interviewees gave a variety of reasons, other than trial tariffs, why defendants might not go to trial. These included concern for the victim, cost of trial, attorneys' unwillingness to "waste the court's time" and cultural factors. Each of these factors may have been of concern to a relatively small group of defendants or attorneys; combined, they may have accounted for a substantial number of guilty pleas.

a. Economic Factors. Economic factors were of concern to both defendants and to managers of justice system resources. Comments by both groups showed awareness of a range of costs:

Part of the cost of the ban is in the types of trials you can do. You can't do many rural cases or complex cases at trial because they cost so much. (Fairbanks prosecutor)

[I didn't go to trial because]...they said even if they could not get me for Attempted Murder they could get me for the Assault charge. It would cost \$20,000 up front to go to trial and I didn't have the money. I believe the state charged high to get me to accept the offer. (Defendant convicted of Assault, Third Degree)

Clients do what lawyers want them to do—that's one reason for the number of pleas despite the ban and presumptive sentencing....For the lawyer in private practice, economics certainly plays a big role as to what the client does. (Anchorage private attorney)

I remember one guy who couldn't afford me so he went to another attorney who charged him less and he pled out to a lesser charge without testing the validity of a very good defense he had. (Anchorage private attorney)

We must recognize what plea bargaining is—society's admission that it won't pay to enforce its laws. The legislature passes laws, but refuses to hire enough DAs and judges, or to provide adequate space in our correctional institutions to enforce the laws they make, so there is plea bargaining. (Anchorage prosecutor)

Economic factors could also work to increase the number of trials, as several attorneys testified:

Work was increased because for a period of time more cases went to trial. My clients had more money from the pipeline and were more likely to go to trial. Breathalyzer equipment was less sophisticated so drunk driving cases more often went to trial. (Fairbanks defense attorney)

After presumptive sentencing came into being there was no reason not to go to trial. I was doing Teamster pre-paid so economics were not a consideration....My Teamsters tended to go to trial a lot. They had a solid work history, were presentable people. (Former private defense attorney)

b. Stress of Trial. Avoiding the personal stresses caused by trial was another reason often stated for the entry of a guilty plea. The major stresses for the defendant were humiliation or embarrassment, and uncertainty. Even without a negotiated sentence, a plea offered an opportunity to "get it over with" as one defendant put it. Defense attorneys might also benefit at a personal level by not going to trial, because they would not appear to be foolishly offering an untenable defense:

Uncertainty scares the hell out of defendants. My clients would plead because they...would avoid the uncertainty of not knowing what the sentence would be if they risk trial. (Fairbanks private attorney)

If the defendant goes to trial he may be acquitted, but he is also subject to the wear and tear of trial. Whether one benefits or not, no one knows. (Anchorage private attorney)

Defendants tend to take a small concession over the chance of losing. Generally speaking, they are scared of the trial process; ignorant of the system. Usually the benefit to the client[s] is the fact that they do not have to go to trial. (Southeast public defense attorney)

The individual maintains some dignity and resources for the family are preserved. (Southeast private attorney)

No matter how we tinker with the system, certain things seem to be immutable, and one of those things is that defendants don't want to go to trial. Defendants hate being in court. The 'What have we got to lose' theory just didn't result in more cases going to trial. (Juneau judge)

Many people don't want to go through the embarrassment of trial. (Fairbanks private defense attorney)

Putting up a stupid defense would tend to annoy a judge. So if there was no real reason to go to trial you might encourage them not to. (Former Anchorage private attorney)

Defense attorneys don't want to lose: it hurts their reputation. They'll plead when they know they have a loser. (Fairbanks prosecutor)

When the ban was instituted, public defenders were getting away with incredible deals. It was too easy--there was a generalized fear of going to trial. The ban was more than a PR move. It got people going to trial and the system benefitted. The results were more credible. The results tended more to reflect the crime that was committed and the background of the defendant. (Anchorage judge)

6. Summary of Findings About Trials

An analysis of trials in Alaska showed some puzzling results. Despite a fairly high trial rate, the system did not appear to have bogged down significantly.⁸⁸ Despite some statistically significant differences between sentences imposed after plea and those imposed after trial, defendants continued to go to trial at rates higher than those of most jurisdictions. Both judges and attorneys insisted that defendants were not penalized for going to trial. However, despite their insistence that there were no trial tariffs, attorneys' advice to their clients often was to avoid trial.

Part of this schizophrenic view of trials on the part of Alaska's attorneys might be accounted for by each individual's focus on the limited range of cases that that

⁸⁸ Disposition times for cases that went to trial, as compared to those in which all charges were dismissed or a guilty plea was entered are shown in Appendix C.

lawyer handles, and the lack of opportunity to explore the larger picture. Part might be accounted for by the presence of the combination of presumptive sentencing and the prohibition of plea bargaining that encouraged defendants to gamble on the 1 in 5 chance that they would be acquitted by a jury. But, finally, part may be accounted for by a genuine belief on the part of many of Alaska's judges and attorneys that sentences were not imposed unjustly or unreasonably.

CHAPTER III

SENTENCING AND THE BAN

CHAPTER III

SENTENCING AND THE BAN

This chapter discusses the sentences actually imposed on defendants; the sentencing law, both statutory and case law; and the interactions between the prohibition of plea bargaining and sentencing practices in Alaska. The sentencing hearing is in many ways the pivotal point of the criminal justice system. Everything that precedes it is oriented towards it; all that follows is structured by the decisions made at that time. Although the Attorney General insisted that it was his intent to return sentencing to the judiciary, not to affect it directly, the prohibition of plea bargaining had, and continues to have, profound consequences for sentencing practices in Alaska.

Two major policy changes that occurred during the career of the ban were the revision of the criminal code and the introduction of presumptive sentencing that took effect in 1980. The most important of these was presumptive sentencing. This chapter examines the interactions between presumptive sentencing and the policy prohibiting plea bargaining, as well as describing patterns of sentencing in Alaska. For background, the new criminal code and presumptive sentencing briefly will be described, and the history of sentencing bargaining will be sketched. Data on sentence lengths for various types of offenses, and on the factors affecting sentence length and the in/out decision will be presented. Finally, the changing roles of prosecutors and judges in establishing sentences will be examined.

A. The New Criminal Code

The mid-1970s were a period of significant change nationwide in criminal justice. Reflecting that new emphasis, as well as a new Governor and a legislature controlled by a group of young Democrats, Alaska established its Criminal Code Revision Commission in 1975. At the time, Alaska's criminal code had not changed substantially since the early Territorial days when federal decision-makers had adopted Oregon's statutes with

few revisions.⁸⁹ The Commission chose a system of categorizing offenses by levels of seriousness (e.g., A, B, C), broadened many of the grounds for conviction by liberalizing intent provisions and including recklessness thus making convictions easier to obtain, and re-defined many offenses.⁹⁰

The revised code adopted in 1978 did not include drug offenses. These were re-codified in 1982, into a structure consistent with other offenses. Sexual offenses also were re-codified in 1982 and 1983, with most behaviors re-classified and made subject to more severe penalties.

Most comments about the new criminal code mingled the effects of the new code and presumptive sentencing. The few comments that did address the effects of the code separately emphasized the value to the prosecutor of the new code:

The new criminal code is complementary to the plea bargain ban. The charging decision is the critical decision in the whole system. It has increased the prosecutor's discretionary authority, because he is deciding on the range of sentence at the time the charge is made. As a result, the defendant's range of choices is less. (Anchorage judge)

The new criminal code has made it easier to comply with the rules. Crimes are clearer with different degrees of a crime, so it is easier to look at the next lower charge. The disposition of cases has become more consistent from office to office. (Anchorage prosecutor)

⁸⁹ Stern, "The Proposed Alaska Revised Criminal Code," UCLA-ALASKA L. REV. 4 (1977). The Commission also relied heavily on Oregon's 1973 revision of its criminal code in developing Alaska's new code, thus maintaining the historical connections between the two codes. Alaska's code revision commission also referred to New York, Arizona, Michigan and Missouri codes, among others. For a detailed history of the Criminal Code Revision Commission's work, see Alaska Dep't of Law, Criminal Code Manual (June 1979).

⁹⁰ The judicial members of the Code Revision Commission formally objected to the structure of the revised code. In a February, 1977 letter to the Commission Chair, Rep. Terry Gardiner, the two judges said, "...the majority of the subcommission, in its proposed major revision of the Code, has proposed a maize (sic) of different types and degrees of crime which will create a colossal bureaucracy in the criminal justice system of the state...." They went on to predict that the new code would result in fewer convictions and more hearings and trials. (Letter available in Judicial Council library).

Under the new criminal code it is easier to get a conviction. Under the old code, you had to plead and prove theory -- mens rea, state of mind. The new code just says "knowingly" and "with criminal negligence." (Anchorage private attorney)

Many attorneys said, however, that charging practices had not changed as a result of the new code.

Drug and sexual offense codes were rewritten separately from the rest of the code in 1982 and 1983. While this separation might have made it easier to distinguish the effects of recodification, attorneys were hard pressed to describe specific effects. When asked about the effects of recodification on drug offenses, many attorneys again did not see any. Some thought that most of the effect came because drug offenses were tied into the presumptive sentencing scheme. A few thought that the recodification itself influenced the handling of drug cases:

Recodifying the drug laws has made it easier to resolve a case without a trial because the sentence ranges are clearer for defendants. Under the old code the sentence was the same or similar for differing offenses. For example, delivery and possession: under the old code, for sale of LSD the sentence range was zero to life, and for sale of heroin, zero to 25 years. The sentence length was too broad. (Anchorage prosecutor)

Before, all drugs were essentially zero to ten years. With the codification, there are now seven separate crimes with seven ranges of penalties. And, when you deal the charge you are essentially plea bargaining. (Anchorage public defense attorney)

The laws are better. They enhance the prosecutor's role; [they're] a much more intelligible set of rules. But I don't know how plea bargaining has been affected. (Southeast judge)

The old laws were a mishmash. The levels of charging are a big improvement. (Rural judge)

The recodification of drug laws created more options for charge bargaining and less reason to sentence bargain.
(Rural prosecutor)

Even fewer attorneys saw a strong relationship between the recodification of sexual offenses and the ban on plea bargaining. Most saw the eight-year presumptive sentence attached to first felony offender first degree sexual offenses as the most important element in any analysis of sexual case dispositions. Only one commented on the recodification itself:

Sex cases are extremely difficult to prosecute. The new criminal code is designed to make it easier to prosecute these cases. (Anchorage private defense attorney)

Overall, the new code was seen as a means of making charging and sentencing decisions more certain and more consistent:

Charging practices changed because there were certain known sentences for certain types of charges. It is a means to control the sentence without actual plea bargaining.
(Anchorage public defense attorney)

Policies concerning plea bargaining and presumptive sentencing were needed to accomplish uniformity in sentencing. The new criminal code unified charging policies throughout the state. (Fairbanks prosecutor)

B. Presumptive Sentencing

Although the ban resulted in longer sentences for some offenders, and sentences for most offenders increased in the late seventies, prohibiting plea bargaining did not stop the impetus in the legislature and public for a new approach to sentencing. Presumptive sentencing was based on the Twentieth Century Fund's recommendations

for a "just deserts" sentencing structure that allowed more judicial discretion than "flat time" proposals, and more legislative structure than mandatory minimums.⁹¹

Alaska's presumptive sentencing statutes specify the exact sentence to be imposed on the typical offender for serious first offenders and for all repeat offenders convicted of a felony. The sentence can be adjusted using statutory or non-statutory aggravating and mitigating factors; in cases where imposition of the presumptive sentence would result in manifest injustice the case can be referred to a three-judge panel which will decide the sentence. Presumptive sentencing directly affects a minority of the offenders sentenced on felony charges and only a very small percentage of all offenders sentenced in Alaskan courts. However, the Court of Appeals has used it as its reference point in deciding appropriate sentences for non-presumptive offenses,⁹² thus extending the influence of presumptive sentencing to all felony offenders.

Presumptive sentencing was of far greater interest to most attorneys and judges than were the changes in the criminal code. Although the two policies were viewed as inextricably connected, they were in fact policies with somewhat different origins. The code structure, as noted above, came from an analysis of other states' codes. Presumptive sentencing, as described below, came from a reform proposal generated by the Twentieth Century Fund's Task Force on Criminal Sentencing.⁹³ The author of that report argued quite specifically that the type of criminal code (based on the Model Penal Code) adopted in Alaska was not the best suited to presumptive sentencing:

The development of an effective presumptive sentencing system clearly requires careful definition of crimes and more

⁹¹ A. DERSHOWITZ, FAIR AND CERTAIN PUNISHMENT, REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING 15 (1976).

⁹² See Di Pietro, "The Development of Appellate Sentencing Law in Alaska," 7 ALASKA L. REV. 265, 281 (1990). Austin v. State, 627 P.2d 657 (Alaska Ct. App. 1981) (*per curiam*) held that "[n]ormally, a first offender should receive a more favorable sentence than the presumptive sentence for a second offender. It is clear that this rule should be violated only in an exceptional case."

⁹³ A. DERSHOWITZ, supra note 91, at 15.

thoughtful application of sentences to those crimes. Current sentencing laws and substantive criminal laws are often loosely organized according to outdated categorizations, e.g., 'robbery,' 'arson,' 'burglary.' These labels often tell us little about a particular criminal offense beyond the technical elements that define it. Although many "modern" sentencing statutes (often adaptations of the Model Penal Code) develop gradations within broad categories of offenses, these codes rarely contain the more detailed system of punishments that we believe is necessary.

The proposed new Federal Criminal Code...groups all offenses into only six categories for purposes of sentencing. The need, however, is not only for detailed definitions and categorizations of crimes, but also for very specific penalties for those crimes matching the relative degree of culpability and risk of harm represented by each offense.⁹⁴

Attorneys in Alaska saw the relatively broad provisions of the code, in combination with presumptive sentencing, as greatly increasing the power of the prosecutor. What they did not agree upon was the interaction of those two policies with the policy prohibiting plea bargaining:

The police and prosecutors saw more quickly than did the defense attorneys and courts that presumptive sentencing would benefit them more than it would the defendants....We knew that judges didn't like presumptives and that they would give SIS [suspended imposition of sentence] and probation. We saw that we could control the whole system by controlling our charging practices because the court's discretion was limited so much by presumptive sentencing. The court never had a problem with our screening practices, but they did have a problem with no charge bargaining on presumptive sentencing cases. Without presumptive sentencing the ban would be much weaker now. (Former Anchorage prosecutor)

After presumptive sentencing went into effect there seemed to be more dealing and charge bargaining. In 1983 when presumptive sentencing was extended to certain first time offenders it gave the prosecutors a hell of a lot of discretion

⁹⁴ Id. at 24.

as to what would be charged -- perhaps more than they should have. The prosecutors could reduce or change the charge and let the judge take the heat....It's fair to say that presumptive sentencing promoted or provoked a loosening up of the ban on plea bargaining. (Former Fairbanks judge)

The two experienced attorneys quoted above came to diametrically opposed conclusions about the interaction between presumptive sentencing and the ban on plea bargaining. Their disagreement was reflected throughout the interviews. No real consensus, even within individual communities, could be ascertained about the changes wrought on the ban by the introduction of presumptive sentencing.

The difficulty may have stemmed, in part, from the fact that the introduction of presumptive sentencing coincided with national trends towards increased emphasis on non-rehabilitative sentencing policies,⁹⁵ with increased openness about and enforcement of sexual offenses,⁹⁶ and with very substantial demographic and economic changes within the state. Any one of these changes alone would have been sufficient to confuse the issue of the interaction of the ban and presumptive sentencing; together, they complicate it to the point at which it would be virtually impossible to accurately determine any precise relationships.

1. History

The Criminal Code Commission discussed above also considered alternatives to Alaska's sentencing procedures. In the 1970s, Alaska judges imposed a sentence of a specific number of years (or days), with a specified amount of the sentence to be served before parole eligibility. Ranges for sentences were typically from zero to ten or twenty years, although some offenses had a range of zero to life. (Alaska does not have the death penalty.)

⁹⁵ von Hirsch, "The Sentencing Commission's Functions," in THE SENTENCING COMMISSION AND ITS GUIDELINES 3 (1987).

⁹⁶ Keiser, Memorandum to Alaska State Legislature, House of Representatives at 3 (June 21, 1985) (Available in Alaska Judicial Council Library).

Several factors increased the pressure for more structured sentencing. A study of sentences imposed in 1974 through 1976 conducted by the Judicial Council at the request of the Commission found that the identity of the sentencing judge was more important than any other factor (including harm to the victim except in cases of death, and the offender's prior record) in determining the length of sentence.⁹⁷ The study also found racial disparities in sentences for several types of offenses.⁹⁸ In addition, the national emphasis was on designing sentencing systems that focussed on the "just deserts" of the offender rather than on rehabilitation.⁹⁹ The Alaska Criminal Code Revision Commission wanted a sentencing structure that increased uniformity among offenders and that reduced unwarranted disparities in treatment of similarly situated defendants.

The Judicial Council recommended to the Commission that it look beyond "flat time" and "mandatory minimum" sentencing schemes to the "presumptive sentencing" model developed by Alan Dershowitz and others for the Twentieth Century Fund.¹⁰⁰ The Commission adopted presumptive sentencing, originally applying to all repeat felony offenders and a very few first felony offenders (typically those convicted of serious offenses that harmed the victims physically). A detailed description of presumptive sentencing written by Professor Barry Stern who served as staff attorney for the Commission was published by the Alaska Law Review in 1985.¹⁰¹

⁹⁷ S. CLARKE AND M. RUBINSTEIN, ALASKA FELONY SENTENCING PATTERNS: A MULTIVARIATE STATISTICAL ANALYSIS (1974-1976), at iii, 40-41 (1977).

⁹⁸ Id. at 43.

⁹⁹ von Hirsch, supra note 95, at 4.

¹⁰⁰ A. DERSHOWITZ, supra note 91, at 19.

¹⁰¹ Stern, supra note 17, at 227.

2. Present Structure of Presumptive Sentencing

Table 28 summarizes the present presumptive sentencing scheme as modified by the legislature in 1982 and 1983. The three most important changes made by the legislature in those years were the recodification of drug offenses (effective January 1, 1983), the reclassification of sexual offenses (effective October 17, 1983), and the extension of presumptive sentencing to all felony first offenders convicted of Class A felonies (effective January 1, 1983). These three changes greatly expanded the number and type of offenders subject to presumptive sentencing.

Each level of offense established by the criminal code has a maximum and minimum sentence. For unclassified offenses, except the two first degree sexual offenses, the minimum sentence shown is mandatory rather than presumptive and may not be suspended or referred to the three-judge panel. The two first degree sexual offenses have presumptive sentences of eight years for first felony offenders. If the victim is physically harmed the presumptive is ten years. Other first offender presumptives are found primarily in Class A offenses, where the presumptive sentence is five years unless the offense results in serious harm to the victim, when it is seven years. The exception is manslaughter, for which the presumptive sentence is always five years. First offender Class B and C offenses also can be subject to a presumptive sentence if the behavior is directed at a member of specific groups, typically law enforcement officers or emergency responders.

Presumptive sentences can be increased or decreased by the use of statutorily-specified aggravating and mitigating factors. A presumptive sentence can be aggravated up to the maximum sentence for the offense, but can only be mitigated by one-half (unless the original presumptive sentence was four years or less, and then the sentence can be mitigated down to probation).¹⁰² If the sentencing judge finds that

¹⁰² See Stern, supra note 17, for a detailed discussion of aggravating and mitigating factors and case law. See also, Rom, "Sentencing in Alaska: Modern Justice in the Frontier State," 10 HAMLINE PUB. LAW AND POL'Y 77 (1989).

TABLE 28					
STATUTORY FELONY SENTENCING AND EARLY RELEASE STRUCTURE IN ALASKA					
Offense	Sentence Length (Years)				
	First Felony Conviction	Second Felony Conviction	Subsequent Conviction	Good Time	Discretionary Parole Eligibility
Murder I	<u>20</u> - 99	<u>20</u> - 99	<u>20</u> - 99	.33	Greater of 20 yrs. or 1/3 of term
Other Unclassified Felonies ^c	<u>5</u> - 99	<u>5</u> - 99	<u>5</u> - 99	.33	Greater of 5 yrs. or 1/3 of term
Unclassified Sexual Offenses ^d	4 [8] 30	7.5 [15] 30	12.5 [25] 30	.33	None on presumptive term
Unclassified Sexual Offenses ^{a,d}	5 [10] 30	7.5 [15] 30	12.5 [25] 30	.33	None on presumptive term
Class A ^e Class A ^{a,b,e}	2.5 [5] 20 3.5 [7] 20	5 [10] 20 5 [10] 20	7.5 [15] 20 7.5 [15] 20	.33	None on presumptive term
Class B ^f Class B ^{b,f}	0 - 10 0 [2] 10	0 [4] 10 0 [4] 10	3 [6] 10 3 [6] 10	.33	1st offense only None on presum. term
Class C ^g Class C ^{b,g}	0 - 5 0 [1] 5	0 [2] 5 0 [2] 5	0 [3] 5 0 [3] 5	.33 .33	1st offense only None on presum. term

NOTE: Mandatory minimum terms are underlined and presumptive terms are in brackets. Statutory minimums and maximums have no underline or bracket. Under certain circumstances, a three-judge panel may reduce a term below the statutory minimum.

- ^a Applies when a defendant possessed a firearm, used a dangerous instrument or caused serious physical injury, except for manslaughter.
- ^b Applies when a defendant knowingly directed the conduct (crime) at a peace officer, correctional officer, or emergency medical responder engaged in the performance of official duties at time of offense.
- ^c Other unclassified felonies include second-degree murder, attempted first-degree murder, selling hard drugs to minors, and kidnapping where the victim is not released safely.
- ^d Unclassified sexual offenses include first-degree sexual assault (forcible rape) and first-degree sexual abuse or assault of a minor (sexual penetration with anyone under 13, daughter or son under 18).
- ^e Class A felonies include manslaughter, robbery using a deadly weapon, selling heroin to an adult, arson with risk of physical injury, kidnapping where the victim is released safely, and first-degree assault.
- ^f Class B felonies include robbery not using a deadly weapon, theft over \$25,000, selling cocaine or marijuana to minors, burglary in a dwelling, arson with no risk of injury, bribery or perjury, second-degree assault, sexual penetration with a person aged 13, 14 or 15, and sexual contact with anyone under 13, daughter or son under 18.
- ^g Class C felonies include negligent homicide, burglary not in a dwelling, second-degree assault, theft over \$500, check forgery, possessing heroin or cocaine, and bootlegging.

* Torgerson, M., The Impact of Presumptive Sentencing on Alaska's Prison Population, Alaska House Research Agency Report 86-D at 10 (1986), and Alaska Sentencing Commission, 1990 Annual Report to the Governor and the Alaska Legislature at 15 (1990).

even with any applicable aggravators or mitigators the presumptive sentence would be "manifestly unjust," the offender can be referred to a three-judge panel for imposition of any sentence within the range specified by the legislature. The three-judge panel also may find that no injustice would occur from imposing the presumptive sentence and may refer the offender back to the sentencing judge.¹⁰³

It has been difficult to find adequate written information in court or prosecutor records about the use of aggravating and mitigating factors to serve as a data source for a statistical study. Better information is available about the three-judge panel. In 1988, the Judicial Council reviewed all 68 cases decided by the panel between May 1985 and November, 1987 (very few cases were decided before May 1985).¹⁰⁴

The Council found that proportionately more Assault I and Manslaughter cases were referred to the three-judge panel (43% and 28% respectively) compared to other types of cases (Robbery I, 20% and Sex Assault or Abuse, First Degree, 15%). Most cases were referred by Anchorage or Fairbanks judges. Typically the panel reduced the sentence (52% of the cases). In 16% of the cases, the prosecutor agreed that the presumptive sentence was inappropriate. In a few instances, the panel left the sentence length the same, but made the sentence non-presumptive so that the offender would be eligible for parole at an earlier date. The most frequent reason cited for reducing a sentence was that the panel found that the offender's potential for rehabilitation was excellent.¹⁰⁵ Second most frequently cited was the prosecution's position that the presumptive sentence would have been manifestly unjust.

¹⁰³ Stern, "Rethinking Manifest Injustice: Reflections Upon the Decisions of the Three-Judge Sentencing Panel," 5 ALASKA L. REV. 1, 3 (1988). See also ALASKA JUDICIAL COUNCIL, FOURTEENTH REPORT: 1987-1988 TO THE LEGISLATURE AND SUPREME COURT, Appendix L (1989).

¹⁰⁴ ALASKA JUDICIAL COUNCIL, supra note 103, at Appendix L.1.

¹⁰⁵ The offender's potential for rehabilitation is a non-statutory mitigating factor established by the Court of Appeals in *Smith v. State*, 711 P.2d 561 (Alaska Ct. App. 1985).

3. Previous Studies of Presumptive Sentencing

The Judicial Council's evaluation of presumptive sentencing during the first year of its implementation found that trial rates had dropped markedly from the late 1970s levels, that the percentages of defendants sentenced to probation only had declined, and that for most defendants, mean active sentence lengths were substantially shorter.¹⁰⁶ However, offenders sentenced presumptively received sentences that were, on the average, significantly longer than comparable offenders sentenced non-presumptively.¹⁰⁷

The Judicial Council evaluated presumptive sentencing again in 1987, using felony cases filed in 1984, the first full year after the major legislative changes.¹⁰⁸ That study estimated that the number of Class A offenders subject to presumptive sentencing had increased by 179% as a result of the 1982 and 1983 statutes. Mean active sentence lengths for most offenses remained shorter than the 1976-1979 sentences, and probation rates did not change from the 1980 rates except for sexual offenses (probation rates dropped slightly from 22% to 17%).

The percentage of filed cases going to trial increased after 1980 but did not return to the high trial rates found during the first three years after the 1975 ban on plea bargaining. The study found that an estimated 40% of the increase in prison months sentenced in 1984 over 1980 was due to the increased numbers of defendants subject to

¹⁰⁶ N. MAROULES, ALASKA FELONY SENTENCES: 1980, at 52-57 (1982). The active sentence length was the net amount of time that the offender was sentenced to serve, obtained by subtracting any suspended time from the total jail time imposed. A sentence in which all time was suspended was treated as a sentence to probation for purposes of this report. Mean active time for a specific offense was calculated only for those offenders who were sentenced to some active time. Those with a net active time of 0 days were excluded from the computation of mean active time, unless noted otherwise.

¹⁰⁷ *Id.* at 42. Additional analysis of the 1980 data suggested that a substantial percentage of the presumptive cases received aggravated sentences, accounting for at least part of the difference between presumptive cases and the sentences that would have been expected otherwise based on the offender's prior record.

¹⁰⁸ T. CARNS, ALASKA FELONY SENTENCES: 1984, at 7 (1987).

presumptive sentencing. About 20% was due to the increased seriousness of prosecuted cases and the remaining 40% was due to the 100% increase in the actual number of convictions between those two years.¹⁰⁹

4. Perceptions of Presumptive Sentencing

Few attorneys or judges were entirely dispassionate on the subject of presumptive sentencing. Even strong supporters often found it to be too rigid or too severe in some instances and wished for more flexibility or judicial discretion in the imposition of sentences. Many also thought it contributed to overcrowding of Alaska's prisons and believed that adjustments might be necessary in light of the state's limited resources. Concern was greatest about first offenders subject to presumptive sentencing, especially in sex abuse or assault cases. There also was little agreement about the effects of presumptive sentencing on the length of sentences.

In some cases sentence lengths have come down, e.g., rape. The new code has brought in uniformity. (Anchorage judge)

The length of sentence is longer because of the presumptive element, and we have a lot of crimes that require presumptive sentencing. Alaskans have a different attitude now about certain types of crime. (Anchorage judge)

With presumptive sentencing, the state is able to salvage cases. If, for example, a case does not meet all the elements of the crime charged, the state can enter into a charge negotiation and see that justice is served. Presumptive sentencing is a bogeyman to the defense. The state does not overcharge as has sometimes been alleged. But I do believe that presumptive sentencing has remedied certain disparities in sentencing. (Anchorage prosecutor)

The length of sentences changed because of presumptive sentencing. Some sentences are longer. For other crimes such as drugs, sentences went down. For Class C theft and forgery offenses, sentence length has gone down. (Anchorage prosecutor)

¹⁰⁹ Id. at 80.

Presumptive sentencing has dramatically increased the length of sentence for sex offenders and third and fourth time offenders. (Anchorage public defense attorney)

The length of sentences has increased, except for real rapes and vehicular manslaughter. (Anchorage public defense attorney)

Many sentences are excessive. It is a typical swing of the pendulum. Social issues are determined at the national level, not the state or local level. At one time, judges had much more discretion. There was too much discretion for the courts and indeterminate sentencing gave Corrections too much authority. (Anchorage private defense attorney)

In Fairbanks, our sentences went down. In the rest of the state, sentences went up. (Fairbanks prosecutor)

Generally sentence lengths have gone up, particularly for sex assault or abuse. It's not wholly attributable to the new criminal code--it's also greater public awareness and condemnation. The sentence for assault has gone up; for some burglary charges, it's gone down. (Rural prosecutor)

My impression is that sentences in drug cases have stabilized at a lower level. First time offenders are treated more leniently. (Anchorage prosecutor)

Dealing with a rigid system where there's uniformity makes it easier on a judge. Uniformity is desirable....First offender non-violent presumptive sentencing is perhaps unfair, especially in sexual abuse type cases....Non-violent presumptively-sentenced offenders should be eligible for parole. (Fairbanks judge)

...Then the second shoe -- presumptive sentencing -- dropped. The idea of the ban was that the judges do the sentencing and it became the legislature that does the sentencing. There were lots of awful results. It's fundamentally inconsistent with due process and fair play. There's no individual treatment -- it's the maw of a big machine. (Anchorage private defense attorney)

Presumptive sentencing hasn't affected the economics except for first offender presumptives like Assault I. Now the cost for a defense in that type of case would be \$15,000 and costs on a non-refundable retainer basis. Before presumptive

sentencing this type of case might very well have pled out and we would have gone to open sentencing but now you can't do that. (Anchorage private defense attorney)

5. Changes to Presumptive Sentencing

The structure and applications of presumptive sentencing have been affected by both statutory and appellate court decisions.

a. Statutory. In 1982 and 1983, the legislature made the presumptive sentencing scheme substantially more severe by increasing the number of offenders and offenses to which it applied. In 1986 several members of the state House of Representatives introduced legislation to modify presumptive sentencing by removing Class A first felony offenders and reducing all other presumptive sentences by one year.¹¹⁰ The bill was, in part, a response to a Department of Corrections report that suggested that presumptive sentencing was the single controllable factor that could be changed to reduce the rapidly-increasing prison population.¹¹¹

In support of revising the presumptive sentencing structure to provide more discretion, especially for first offenders, Rep. Clocksin argued that elimination of disparities in sentencing had probably been brought about by the ban on plea bargaining and that presumptive sentencing was not needed for that purpose. He added that:

Presumptive sentencing has actually transferred discretion from the judges to the prosecutors. Control over length of sentencing is in the hands of prosecutors since the charge filed often determines the length of the prison term. Given the choice I'd let a judge decide before a prosecutor. The judge is selected after strict scrutiny, subject to a public vote, and his/her decisions may be tested on appeal. A prosecutor

¹¹⁰ HB554, Introduced February 7, 1986.

¹¹¹ A. BARNES AND R. McCLEARY, ALASKA CORRECTIONAL REQUIREMENTS: A FORECAST OF PRISON POPULATION THROUGH THE YEAR 2000, at vii (1985).

is unelected and his/her decision is not subject to checks and balances.¹¹²

That legislation did not pass. However, a change in good time credits eased some of the pressure on prison populations. Between 1980 and 1986, most offenders accumulated "good time" credits at a rate of 1 day off for every 3 days served without prison discipline occurring. In 1986, Alaska Statute 33.20.010 was amended to provide one day off for every two days served, or "one-third of the term of imprisonment." This change allowed most offenders that had been sentenced presumptively to be released after serving only two-thirds of their sentences rather than three-quarters, and helped to ease the pressure of rapidly increasing prison populations.

b. Appellate. The Court of Appeals, established in 1980 shortly after the new criminal code and presumptive sentencing took effect, has played a major role in interpreting the statutes.¹¹³ Using presumptive sentencing as its reference point, the Court of Appeals has developed guidelines and benchmarks for both non-presumptive and presumptive sentences. The sentencing structure that has evolved as a result of the court's activity is comprehensive in its scope, but occasionally byzantine in application. The court continues to extend the principles stated by the legislature to a wider variety of cases and circumstances.

C. Patterns of Sentencing from 1974 through 1987

Sentencing patterns changed significantly in the 1970s after the plea bargaining ban. They changed again in 1980, when the new criminal code went into effect, and by the mid-1980s, had evolved into a pattern that reflected the legislative changes of 1982 and 1983. Some of the initial changes were clearly tied to the ban; others were likely to have been more reflective of the national emphasis on increasing severity in criminal

¹¹² Letter from Rep. Clocksin to Rep. Mike Miller, Chair of the Alaska House of Representatives (Feb. 7, 1986) (available in Judicial Council files).

¹¹³ See Di Pietro, supra note 92, for a full discussion of the Court of Appeals and Supreme Court benchmarks and cases since statehood.

sanctions. As noted above, adoption of the new code was associated with shorter sentences for many offenders sentenced non-presumptively, and significantly longer sentences for presumptively-sentenced offenders. By the mid-1980s, sentences had increased in length again, in part due to the new legislation. The next two sections describe sentencing patterns in general between 1974 and 1987, and then focus specifically on possible causes of disparity in sentencing that have been important in past studies of sentencing.

1. General Sentencing Patterns

The initial effects of the ban, in 1975-76, were to change sentencing patterns markedly for some offenses, but not others.¹¹⁴ Two different measures of change were used: first, whether the offender was more or less likely to be sentenced to serve active time; and second, the mean length of the active jail time imposed for those offenders sentenced to one or more days to serve. The percentage of offenders sentenced to jail increased for most offenses, but not substantially (Table 29). The only decrease came in Assault II and III offenses, and was not large (57% of those offenders were jailed in 1974-75, compared to 50% in 1975-1976).

The average length of sentence went down for many offenders (Table 30), but up for a few. Persons convicted of Robbery, Assault II and III, Theft II, Forgery II and Sexual Abuse of a Minor I (or Lewd and Lascivious Acts or Incest, the comparable offenses under the old code) all were sentenced to somewhat shorter terms of incarceration. Defendants convicted of Burglary I and II, Sex Assault I, and drug offenses received longer sentences immediately after the ban. Tables C-2 through C-7 (Appendix C) show the detailed sentencing information for each specific offense of conviction between 1984 and 1989 found in the analysis. The tables include information about the number of offenders convicted of each offense, the percent receiving probation, the mean sentence and standard deviation for offenders sentenced to active time, and the distribution of sentences for each offense.

¹¹⁴ ALASKA BANS PLEA BARGAINING, supra note 8 at 112.

Tables 29 and 30 show two indicators of sentences: the "In/out" decision (whether the offender is required to serve any time in jail or prison)¹¹⁵ and the mean active sentence length (the active sentence is the total amount of jail time imposed, less any suspended time; offenders with all time suspended are treated as being on probation). The offenses chosen for comparison could not be matched perfectly because of the substantial changes in the criminal code.¹¹⁶ In a few instances apparent changes in sentencing patterns are noted as being more related to lack of comparability among the offenses than to actual differences in sentencing.

The original evaluation of the ban on plea bargaining analyzed sentencing patterns by looking at the sentence imposed on each charge.¹¹⁷ The current study re-configured the database to characterize each defendant by the single most serious convicted charge and then analyzed the sentence for that single charge. Figure 11 shows the total number of defendants sentenced to serve active time, for each year studied. The original evaluation found that sentence length increased significantly as a result of the ban primarily for less serious offenders: those convicted of "low-risk" property crimes (no prior felony convictions, a less serious offense and no companion charges), forgeries and frauds, and drug offenses. Sentences for violent offenders and more serious property offenders were not significantly affected by the ban.¹¹⁸ The original

¹¹⁵ Jail and prison are not distinguished in Alaska. Nearly all custodial facilities are funded and supervised by the state's Department of Corrections. The few exceptions are several small local jails that serve primarily as holding facilities or for very short sentences (under 30 days) that are run by the state Department of Public Safety in conjunction with some municipalities. Throughout the report, the terms jail and prison are used interchangeably to mean both jail and prison sentences unless otherwise noted.

¹¹⁶ 1980s offenses and their comparable 1970s offenses are: Robbery I = Robbery (or Armed Robbery); Assault II and III = Assault with a Deadly Weapon; Burglary I = Burglary in a Dwelling; Burglary II = Burglary Not in a Dwelling; Theft II = Grand Larceny (also Receiving and Concealing, Embezzlement Under \$25,000, various other larcenies); Criminal Mischief II = Malicious Mischief; Forgery II = Forgery of a Credit Card, Record, or Debt; Sexual Assault I = Rape; Sexual Abuse I = Lewd and Lascivious Acts and Incest; Sexual Abuse II = Statutory Rape; Drugs III = Sale of Cocaine, LSD, Amphetamines or Barbiturates; and Drugs III = Sale of Marijuana or Possession of Cocaine.

¹¹⁷ ALASKA BANS PLEA BARGAINING, supra note 8, at 134.

¹¹⁸ Id. at 195-207.

TABLE 29 OFFENDERS SENTENCED TO JAIL ("IN/OUT" DECISION) BY OFFENSE FOR ANCHORAGE/FAIRBANKS/JUNEAU						
	8/15/74- 8/14/75	8/15/75- 8/14/76	1984	1985	1986	1987
Violent	62%	63%	79%	74%	84%	83%
Robbery I	80%	82%	97%	94%	100%	100%
Assault II & III	57%	50%	71%	68%	73%	87%
Property	48%	51%	71%	63%	59%	57%
Burglary I	46%	67%	66%	64%	69%	69%
Burglary II	36%	51%	65%	64%	63%	58%
Theft II	46%	48%	57%	54%	49%	46%
Crim. Mischief II	[100%]	[20%]	64%	65%	47%	47%
Forgery II	78%	63%	68%	68%	57%	47%
Sexual	61%	77%	86%	86%	81%	90%
Sex Assault I	[75%]	92%	92%	87%	[88%]	94%
Sex Abuse I	[56%]	[67%]	95%	100%	91%	100%
Sex Abuse II	[0%]	[100%]	84%	78%	80%	80%
Drugs	36%	48%	67%	59%	59%	69%
Drugs III & IV	38%	42%	60%	55%	53%	65%
ALL OFFENSES	51%	56%	75%	70%	68%	69%

[] indicate fewer than 10 cases.

Alaska Judicial Council
Plea Bargaining Re-Evaluation, 1991

TABLE 30 MEAN ACTIVE SENTENCE LENGTH (IN MONTHS) FOR SELECTED OFFENSES FOR ANCHORAGE/FAIRBANKS/JUNEAU, ALL CONVICTED OFFENDERS						
	8/15/74- 8/14/75	8/15/75- 8/14/76	1984	1985	1986	1987
Violent	17	15	23	25	30	19
Robbery I	32	20	61	80	127	55
Assault II & III	11	9	13	13	14	16
Property	5	4	10	10	10	10
Burglary I	4	6	18	17	26	24
Burglary II	2	6	14	10	13	11
Theft II	4	3	9	10	7	8
Crim. Mischief II	[5]	[2]	14	13	5	12
Forgery II	13	8	17	13	14	10
Sexual	31	50	54	54	50	71
Sex Assault I	[57]	82	101	76	[69]	159
Sex Abuse I	[27]	[18]	86	111	89	81
Sex Abuse II	[0]	[18]	29	22	29	34
Drugs	5	17	18	14	12	13
Drugs III & IV	4	8	10	14	11	15
ALL OFFENSES	13	17	29	26	31	27

[] indicate fewer than 10 cases.

Alaska Judicial Council
Plea Bargaining Re-Evaluation, 1991

evaluation also found that the likelihood of a jail sentence increased after the ban for the same groups of offenders.¹¹⁹

In the current analysis, using a unit of analysis defined as case rather than as charge, sentence lengths changed for most offenses immediately after the ban, but not consistently up or down. The changes could not be termed substantial because of the relatively small number of cases and the shortness of the time available for measuring

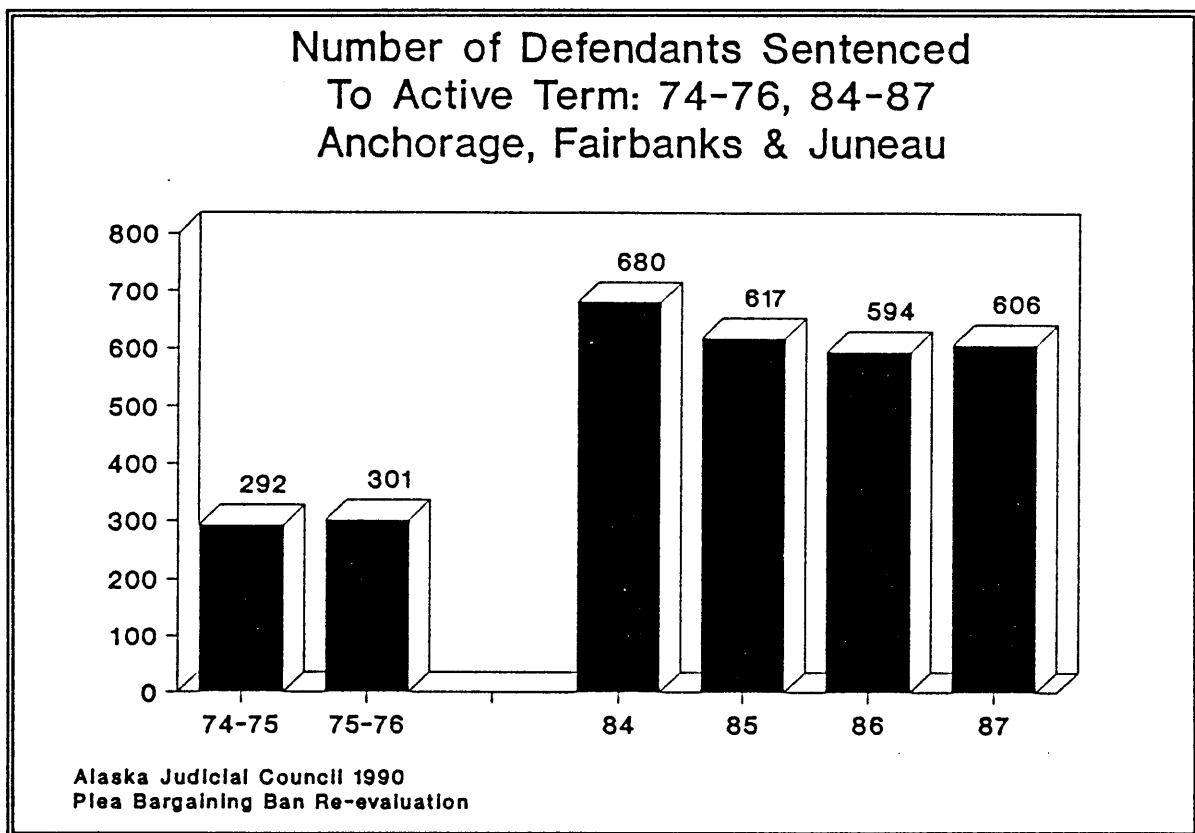


FIGURE 11

the charge. The likelihood of a jail sentence also increased for most offenses. Table 29 shows that by the mid-1980s, the likelihood of a jail sentence was even higher than in

¹¹⁹ *Id.* at 207-212. The likelihood of going to jail was defined differently in the original evaluation. Offenders who were sentenced to 30 days or less were considered to have been on probation. In the present analysis, an offender was counted as not having gone to jail only if the sentence did not include any jail time at all to serve. The earlier database was re-analyzed using this current definition of jail/no-jail; however, when results are cited directly from the original study, the definition used in that study (30 days or less) is the one meant.

1975-76 for each major group of offenses.¹²⁰ Among individual offenses the likelihood varied, with some decreases and some increases, but overall, three-quarters of the 1984 offenders were sentenced to some jail time. By 1987, the overall percentage of defendants incarcerated had dropped to 69% (Figure 12), influenced primarily by a large drop in the percentage of property offenders likely to go to jail (from 71% down to 57%).

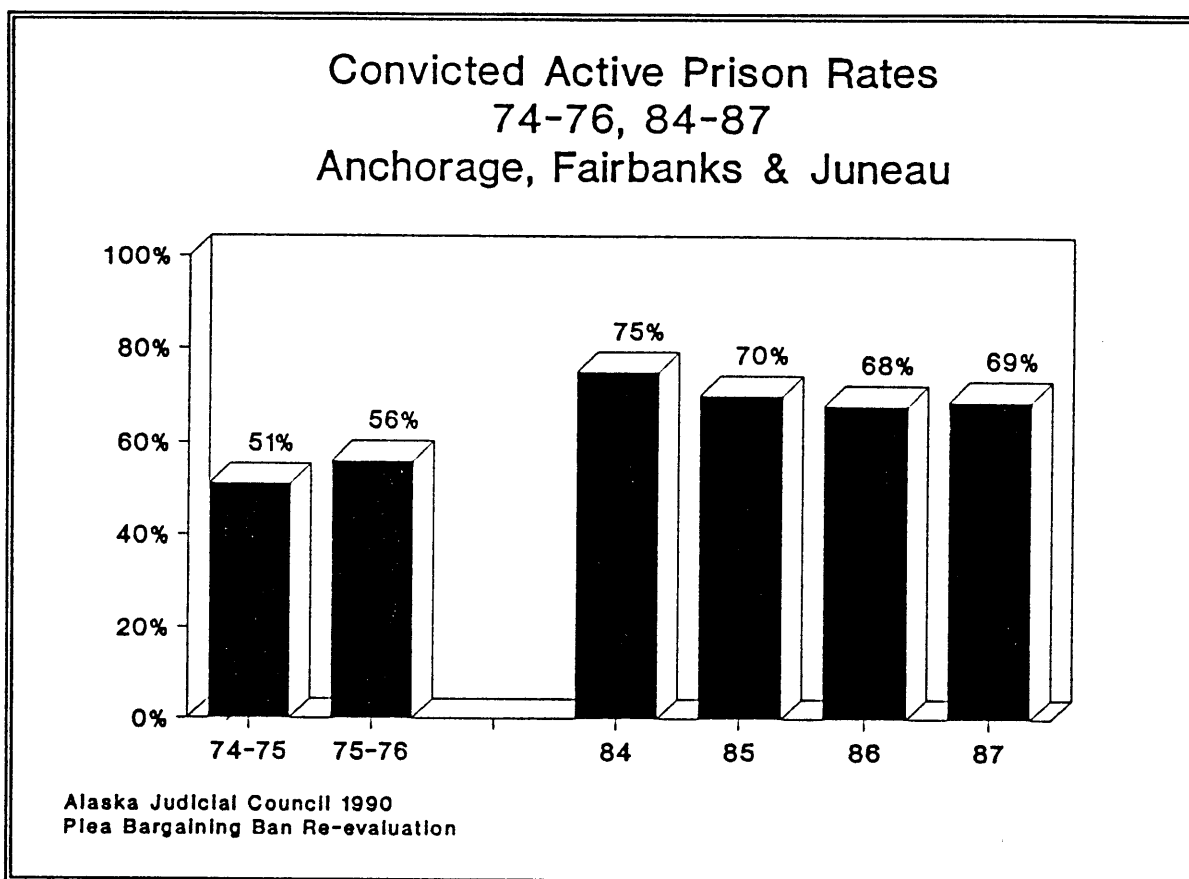


FIGURE 12

Mean sentence lengths fluctuated more than did the in/out decisions between 1976 and 1984. In part, the differences may be due to lack of comparability among some of the offenses. For example, Robbery under the old code included both armed robbery

¹²⁰ Alaska's incarceration rates appeared to be about the same or lower for most offenses than the average for other state courts, according to a recent Department of Justice study. For example, in 1986, 31% of Alaska felons convicted of Burglary I received a sentence with no incarceration, as did 37% of those convicted of Burglary II. In other state courts, the average for no incarceration (i.e., no jail and no prison) was 26%. For rape, compared to sexual assault I (Alaska), the rates of probation were 12%. Drug trafficking average probation rates for other states were 36%; Alaska's rate for drugs III and IV (Classes B and C) was 32%. Langan, P., "Felony Sentences in State Courts, 1986," Bureau of Justice Statistics Bulletin, Feb. 1989 at 2.

and "strongarm robbery." These are generally distinguished in the new code as Robbery I and Robbery II. The differences in mean sentence lengths may be partly due to the inclusion of less serious offenses in the 1970s group.

The offenses that carried first felony offender presumptive sentences all experienced increases in sentence length. Robbery I rose from 56 months to 61 months.¹²¹ Sex Assault I rose from 82 to 101 months, and Sex Abuse I rose from 18 (there were fewer than 10 cases in the 1975-76 group) to 86 months. Sentences increased for all other offenses, reflecting the general tendency towards higher sentences. Figure 13 graphically shows the large differences in total months sentenced between the mid-1970s and mid-1980s.¹²² Some of the increase is due to the increased number of offenders as shown on Figure 11, but a substantial portion is due to the higher sentences.¹²³

Various offender and offense characteristics played roles in sentencing. Table 31 shows that for the "in/out" decision, gender, race (if Native), employment status, education, substance abuse, prior convictions and notice of an aggravating factor were all important in a bi-variate analysis. As discussed below, the apparent race disparity disappeared after more detailed analysis. Because the bi-variate analysis does not take into account the inter-relationships of factors with each other, it cannot be considered conclusive evidence of the effects of these variables.

¹²¹ Again, some of the change may be due to lack of comparability. Robbery in 1974 - 76 under the old code included some actions that would have been prosecuted as Robbery II, a Class B offense, in 1984.

¹²² No accurate data are available on the actual amount of time served -- as compared to actual time sentenced -- for the average offender. Parole guidelines determine to some extent the amount of time served by offenders eligible for parole; good time provisions structure the amount of time served by presumptively-sentenced offenders and also play a part in the sentence of other offenders.

¹²³ Attorney General Gross commented during the first evaluation of the ban that:

I'm inclined to believe that if we hadn't done a thing in terms of plea bargaining, sentencing would still be higher today. I think the sentences are a reflection of the temper of the times. (ALASKA BANS PLEA BARGAINING, *supra* note 8, at 13).

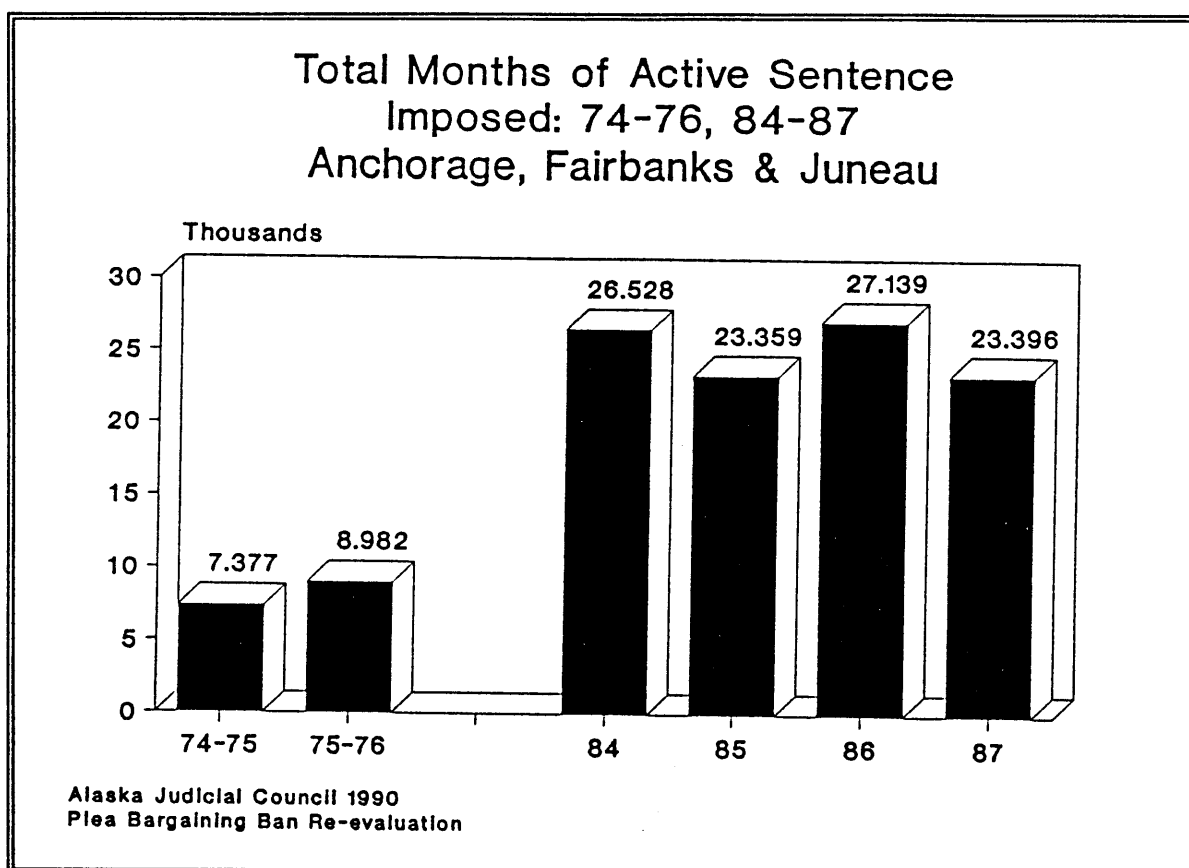


FIGURE 13

2. Disparities in Sentencing

One of the primary purposes of the 1980 sentencing revisions was stated in the legislation itself as:

The legislature finds that the elimination of unjustified disparity in sentences and the attainment of reasonable uniformity in sentences can best be achieved through a sentencing framework fixed by statute as provided in this chapter.¹²⁴

Primary among the disparities of concern to the legislature were two found in several Judicial Council studies in the mid-1970s. The first of these was the identity of

¹²⁴ ALASKA STAT. § 12.55.005 (1984).

<p style="text-align: center;">TABLE 31</p> <p style="text-align: center;">PERCENT OF OFFENDERS SENTENCED TO JAIL ("IN/OUT" DECISION) BY OFFENDER CHARACTERISTICS (Database: 1986-1987 Subset)</p>				
Offender	Characteristic	Percent of Offenders With Jail Time	Number of Offenders With Jail Time	Probability That Null Hypothesis is True
Age:	Under 30	70%	649	0.22
	30 and Over	66%	314	
Gender:	Male	69%	853	0.00*
	Female	44%	88	
Employment Status:	Unemployed	74%	286	0.01*
	Other	65%	411	
Education:	Less Than High School	76%	228	0.00*
	High School +	66%	370	
Chronic Substance Abuser:	Yes	76%	539	0.00*
	No	55%	340	
Substance Abuse During Offense:	Yes	77%	384	0.00*
	No	59%	497	
Prior Felonies:	Yes	86%	257	0.00*
	No	61%	646	
Prior Misdemeanors:	Yes	75%	565	0.00*
	No	67%	343	
Notice of Aggravating Factor:	Yes	92%	137	0.00*
	No	80%	127	
Related to Victim:	Yes	75%	95	0.20
	No	68%	754	
Race:	Black	74%	118	0.15
	Other**	67%	820	
	Native	79%	248	0.00*
	Other**	64%	690	

* Significant at less than 0.05

** Black/Other: Other includes all groups other than Black;
Native/Other: Native includes all groups other than Native.

Alaska Judicial Council
Plea Bargaining Re-Evaluation, 1991

the sentencing judge, which one study found to be more important than most other tested factors:

In two offense classes (violent felonies and drug felonies), being sentenced by a 'strict' judge was associated with a longer sentence, and in two other classes (property and fraud felonies), being sentenced by a 'lenient' judge was associated with a shorter sentence....This effect is as large as or larger than all the effects of other factors found related to sentence length in Class 2 [violent], except for being convicted of rape.¹²⁵

Similar findings held true for the other offense classes, except that "lenient" judges were not as lenient as strict judges were strict.¹²⁶ Other Judicial Council studies that tested the effects of judge identity on sentence length also found that strictness or leniency of the judge was important in determining sentence length.¹²⁷

Analysis of judge identity for the present study did not indicate any significant contribution made by the variable of judge identity to the mean active sentence length. The lack of importance of this variable may reflect the combined contributions of presumptive sentencing and the guidelines and benchmarks set by the appellate courts. To the extent that this hypothesis is correct, the legislature and the courts have been successful in their efforts to reduce disparity in sentencing.

The second factor of great importance to the legislature was the apparent racial disparity in sentences during the 1970s, which had been identified in several Judicial

¹²⁵ S. Clarke and M. Rubinstein, supra note 97, at 41.

¹²⁶ Id. at iii-iv.

¹²⁷ See ALASKA BANS PLEA BARGAINING, supra note 8, at 198, 201; T. WHITE and N. MAROULES, supra note 75, at 24, 35; and N. MAROULES, supra note 106, at 30.

Council studies.¹²⁸ Disparities were evident for several types of offenses in the mid-1970s (1974 - 1976), for both Blacks and Natives. By the time of the study of 1976 - 1979 felonies, the only remaining disparities were for Blacks in drug offenses (primarily sale of heroin) and a small disparity for Natives in rural property offenses. The study of 1980 felonies found no disparities;¹²⁹ a study of 1984 felonies also found no disparities.¹³⁰

Analysis of the race of the defendant in the 1984-1987 database found some instances in which race initially appeared to play a role in sentencing.¹³¹ Table 31, showing a bi-variate analysis, found that Natives were somewhat more likely to receive a jail sentence than were other groups combined. Natives may have differed from non-Natives in characteristics which account for the apparent racial disparities, however. Six specific offenses were selected for further examination: Theft II, Assault III, Burglary I, Sexual Assault II, Drugs II, and Sex Abuse I. As in the case of trial tariffs, the in/out decision and length of sentence were treated separately. Both analyses controlled for presumptive status, number of convicted charges, number of prior felonies, trial versus plea, sex, and urban/rural residence. The latter characteristic was hypothesized to possibly account for apparent racial disparities since there were fewer sentencing options for rural convicted offenders.

Logit analyses on the in/out decision yielded no instance of disparities in the likelihood that a Native offender was sent to jail. With the exception of Sex Abuse I, all multiple regression analyses also yielded negative results. To provide more background

¹²⁸ See ALASKA BANS PLEA BARGAINING, supra note 8, at 201-204; S. CLARKE and M. RUBINSTEIN, (1974-1976), supra note 97, at 43; T. WHITE and N. MAROULES, supra note 75, at 40-41, 63.

¹²⁹ N. MAROULES, supra note 106, at 57-58.

¹³⁰ T. CARNS, supra note 108, at 41.

¹³¹ A series of bi-variate and multi-variate analyses of race were carried out. Both the "In/out" decision and mean sentence length were included in the analyses. The analyses are available on request from the Judicial Council. Both the 1984-1987 database and the 1986-1987 sample were used.

for the Sex Abuse I finding, every defendant convicted of the offense was listed together with information about the sentence, method of disposition and other important variables.

Two Native defendants and one Caucasian defendant were found to have exceptionally long sentences (275 months -- 23 years -- or more). Each of these cases was reviewed by the staff attorney. All three defendants had two or more prior felony convictions, automatically subjecting them to a 25-year presumptive sentence. Each of the three had appealed their sentence, and the Court of Appeals had affirmed each sentence.¹³² Because the three appeared to be unusual cases, not reflective of the typical sentencing patterns, they were excluded from the dataset and the multiple regression analysis was re-run. Without the three defendants, there was no evidence that Natives received longer sentences.

The available evidence from the 1980s suggests that there are no statistically significant racial disparities in Alaska sentencing patterns. The reduction in disparities cannot be attributed to presumptive sentencing because the most noticeable disparities had disappeared prior to its introduction. The largest disparity in the 1976-79 study was for Blacks convicted of heroin offenses; that disparity was not found in the study of 1980 felony sentences. However, drug offenses were not brought under the new criminal code and the presumptive sentencing scheme until 1983, meaning that presumptive sentencing could not have been responsible for the elimination of the disparity.

The small increase in length of property sentences for rural Natives found in the 1976-79 study had also disappeared in the 1980 analysis. That reduction could possibly be attributed to presumptive sentencing. Even if presumptive sentencing cannot be credited with eliminating racial disparities, it is apparent that the use of presumptive

¹³² The three appellate cases were *James v. State*, 754 P.2d 1336 (Alaska Ct. App. 1988); *Murray v. State*, 770 P.2d 1131 (Alaska Ct. App. 1989); and *Jones v. State*, MO&J No. 1541 (Alaska Ct. App. Dec. 16, 1987).

sentencing has not perpetuated pre-existing disparities or created new ones that can be statistically identified using the data currently available.

The ban on plea bargaining also has been credited with eliminating racial disparities. Some attorneys suggested that once sentencing was returned to judges, the disparities disappeared:

DAs do make sentence recommendations [now]. The strict ban [on sentence recommendations] was to try to achieve equality throughout the state – from district to district, or by racial issues. The past several years, the legislature and court have concluded that there was a sentencing disparity. The message was that it would no longer be tolerated. (Southeast private defense attorney)

The evidence actually supports this hypothesis better than the suggestion that presumptive sentencing removed racial disparities, because the disparities found in the 1976-1979 study were considerably fewer than those in the 1974-1976 study. However, a definitive analysis was not undertaken for this report, and the available analyses do not provide the final test of the hypothesis.

Attorneys and judges were asked whether they perceived racially-based differences in the treatment of defendants. About half said "no." The other half often perceived biases, sometimes favoring minorities in various circumstances, or disfavoring caucasians:

I am representing two defendants....I believe their race played a role in the number of charges they received. [Has] less to do with race than the fact that the defendants are outsiders. In some cases, cultural differences have been taken into consideration, but it has generally been in the defendant's favor. (Rural private defense attorney)

Some attorneys commented that cultural and socio-economic differences were more important than race in determining case outcomes:

[What's important is] not just ethnicity alone, but environmental deprivation coupled with socio-economic class....The defendant who comes from a deprived socio-economic background may be shown more tolerance, e.g., because he was abused as a child. (Anchorage prosecutor)

There are not racial issues, but there are cultural issues. Sentence may be affected by family or other support services. Or, things in which our society may measure worth, e.g., maintaining employment, or consistent contact with the probation officer, may not be valid considerations in other cultures....Generally speaking, I think the system is sensitive to the cultural differences in [these]... communities. (Southeast private defense attorney)

Some attorneys and judges believed that the victim's race might make a difference in how the offense was handled in the justice system. Others thought that drug and bootlegging cases were sometimes susceptible to racial stereotyping, but also noted that stereotypes could work to the defendant's advantage:

If anything, because of the perception problems, the court...[is] probably more likely to be more lenient with a Native than a Caucasian defendant. Where alcohol is a factor, it is more of a mitigator for a Native than a Caucasian. (Fairbanks prosecutor)

They also cautioned that participants in the justice system continued to be alert to the possibility of racial biases, and to work hard to avoid any negative effects:

Natives are disproportionately represented in the criminal world, though I don't think they get disproportionate sentences. Most judges troubled by the large number of native defendants and are sensitive to it. (Anchorage public defense attorney)

The overall tone of the comments suggested a system in which most participants were acutely aware of ethnic, racial and cultural issues. Attorneys and judges did perceive these differences among defendants as important in the outcome of cases. They included

gender, education, the defendant's community, and substance abuse problems as equally important determinants of case outcome.

D. Plea Bargaining and Sentencing

1. Historical Perspective

We conclude that the Attorney General was successful in bringing about considerable change in the system of plea bargaining which was fully institutionalized in Alaska prior to August of 1975. The principal aim of his policy--the prohibition of sentence negotiations and, indeed, of all sentence recommendations to the court by prosecutors--was substantially accomplished.

Although the Attorney General instituted no formal controls or procedures to monitor compliance, the rule against sentence bargaining was rather closely followed by prosecutors, and there was little evidence of under-the-table negotiation. There are a number of explanations for this high level of compliance; primary among these was the early recognition by prosecutors that their lack of involvement in the sentencing decision was to their advantage most of the time.¹³³

The Judicial Council's first evaluation of the ban concluded, as noted above, that sentence bargaining had been substantially reduced. Prior to the ban, most cases had resulted in a sentence agreement of some sort:

Plea bargaining was wide open. Sentence length and charges could be negotiated. It was wide open and unrestrained. (Former Anchorage public defense attorney)

I was spending probably one third of my time arguing with defense attorneys....The haggling wasn't merely as to the strengths and weaknesses of cases, it was as much to do with

¹³³ ALASKA BANS PLEA BARGAINING, supra note 8, at 219.

sentencing--what I thought a person should get. (Assistant district attorney)¹³⁴

After the ban, the situation changed drastically:

The rule is that in 65 percent of your cases there's no discussion. The D.A.'s input is insignificant; who the defense attorney is is insignificant. It's the judge!...There's not that much that can be done [for the client]. I mean, 15 minutes...at the most, trying to soften the D.A. before the sentencing. A lot of times you're just processing people through. In a large percentage of your cases you've done absolutely nothing for your client. [assistant public defender]¹³⁵

Sentence recommendations before the ban were typically for a specific length of time and were generally done under Rule 11(e). They could include, in addition to a specific term, the prosecutor's position on probation conditions, recommendations for treatment, and any other information relevant to the sentence.¹³⁶ The judge was bound to impose "either the disposition provided for in the plea agreement or another disposition more favorable to the defendant."¹³⁷ They were often combined with charge reductions or agreements to dismiss one or more charges, but the sentence was generally the focus. Less frequently, defendants would agree to charge reductions or

¹³⁴ Id. at 46.

¹³⁵ Id. at 30.

¹³⁶ Id. at Table II-1, Appendix B, shows the types of sentence recommendations found in the court case log notes made by the in-court clerk for each case. Because charge was used as the unit of analysis, a re-analysis by defendant might show more clearly the practitioners' perceptions that specific sentence recommendations predominated. The table shows that about 50% of Anchorage charges in the first year had sentence recommendations (both for a specific term and other types of recommendations), compared to only about 17% in the year after the ban. Fairbanks and Juneau had slightly different numbers of recommendations, but a similar pattern of marked reduction in the number of recommendations in the first year after the ban.

¹³⁷ ALASKA R. CRIM. P. 11(e)(3).

dismissals with "open sentencing" at which each attorney would be free to argue the merits of a specific sentence or conditions before the judge.¹³⁸

Trials and open sentencings were exceptions to the rule; they were break downs in the institution of plea bargaining--in the basic principle of sitting down and working things out.¹³⁹

Attorneys and judges estimated that from one-quarter to one-half of the time, the plea agreements before and shortly after the ban included the judge as an active participant. After the ban, the state vigorously objected to judicial participation in plea negotiations, and in two separate cases, Buckalew¹⁴⁰ and Carlson¹⁴¹, Alaska's Supreme Court agreed with them.¹⁴² Since that time there has been no evidence that in any way suggested that individual judges have had any role in negotiating pleas.

Judges continued to accept or reject negotiated pleas, as required by Alaska Criminal Rule 11. However, most pleas were not Rule 11 pleas. On the infrequent occasions that they were, judges generally accepted the agreement. But that was not guaranteed. One defendant interviewed said that her plea agreement had been rejected:

¹³⁸ See e.g., Padie v. State, 594 P.2d 50 (Alaska 1979), in which the defendant pled guilty to a negotiated charge of manslaughter, but had open sentencing. See also Winkler v. State, 580 P.2d 1167 (Alaska 1978), in which the defendant had a plea agreement with open sentencing and was under the impression that he would receive probation; and Gordon v. State, 577 P.2d 701 (Alaska 1978) in which the defendant pled guilty after a pre-plea conference with the judge at which the judge said that he would sentence him to no more than 5 years barring adverse information from the pre-sentence report. Gordon was not a Rule 11(e) agreement involving the state's attorney (who was present at the pre-plea conference but remained silent), and the judge imposed the 5-year sentence.

¹³⁹ ALASKA BANS PLEA BARGAINING, supra note 8, at 4.

¹⁴⁰ 561 P.2d 289 (Alaska 1977).

¹⁴¹ 555 P.2d 269 (Alaska 1976).

¹⁴² See also Gordon, 577 P.2d 701 in which the defendant received the sentence indicated by the judge and later appealed it as excessive. The cases cite Federal Criminal Rules (FED. R. CRIM. P. 11(e)(1)) which prohibit federal judges from negotiating with defendants in support of their findings that Alaska judges should not participate in plea negotiations.

The state offered a sentence that included ten days in jail and an alcohol program. The judge rejected it, and said he wanted me to do a year. My case went before a three-judge panel, but they referred it back to the judge without a recommendation. The judge sentenced me to one year because of the incident with the police officer. I had accidentally fired a handgun. The officers came to my apartment; I agreed to give them the weapon. I handed it to the officer muzzle first. I was intoxicated at the time....My lawyer advised me not to go to trial because of the policeman's testimony....(Defendant convicted of one count of Assault III).

Prosecutors were permitted after the ban, in Attorney General Gross's words, to "employ open sentencing bringing to the court's attention all factors relevant to a consideration of sentence rather than recommending a particular sentence."¹⁴³ The Attorney General made it plain that he intended to eliminate sentence bargaining:

...[I]f we can do this--if we can really make a change in the system to effectively eliminate sentence bargaining--the office will have accomplished something really meaningful....I think it would really be satisfying to...do something which, while difficult, is truly recognized by the public as being valuable.¹⁴⁴

Even at an open sentencing procedure, the prosecutor had a variety of options, which might or might not have been the subject of agreements with a defense attorney. Prosecutors could remain silent, a position that a number of them assumed after the ban. They could omit mention of a prior offense, the use of a weapon, and other statutory or non-statutory aggravating factors. They could agree to not argue with the defense recommendation or could make a positive statement of concurrence with the defense's position. None of these actions on the part of the prosecutor required a recommendation

¹⁴³ Memorandum from Attorney General Avrum Gross to all District Attorneys, July 3, 1975, at 1-2. See Appendix A infra.

¹⁴⁴ Memorandum from Attorney General Avrum Gross to all District Attorneys, July 24, 1975, at 1. See Appendix A infra.

of a specific length of sentence. There was no indication in the Council's 1978 evaluation, however, that these actions were common. One prosecutor said:

The only person that really has any chance to evaluate the case -- the district attorney -- is not allowed to speak.¹⁴⁵

Attorney General Gross's emphasis was on the time prior to trial or entry of plea; because he viewed sentencing as a judicial function, he spent relatively little time discussing the prosecutor's role after the entry of a plea in great detail. He noted that:

[This policy] will also to a substantial degree put sentencing back in the courts, where I think it belongs, instead of it being a product of a negotiated arrangement.¹⁴⁶

2. Current Status of Sentence Negotiations

Attorneys interviewed for this study described sentence recommendations in the mid- and late 1980s that were related to conditions on sentences, rather than being recommendations for specific sentence lengths. They estimated that recommendations occurred in 25% to 50% of their cases (a general estimate, statewide; some attorneys in Anchorage and Fairbanks thought many fewer sentence recommendations occurred; a few thought there were more):

No deals on sentences in Fairbanks. They will agree not to recommend consecutive sentences; not to rely on aggravators. (Fairbanks Judge)

[Sentence recommendations occur in] less than 10% of felonies and misdemeanors. In Fairbanks, the deal is made on the charge, not the sentence. The state agrees not to take a position on an SIS or will not ask for more than a specific number of years. (Fairbanks public defense attorney)

¹⁴⁵ ALASKA BANS PLEA BARGAINING, *supra* note 8, at 96.

¹⁴⁶ Memorandum from Attorney General Avrum Gross, July 3, 1975, at 2-3. *See* Appendix A *infra*.

It [bargaining] occurs more in nonpresumptive than if it is presumptive....The state will not agree to a recommended sentence, but they will agree not to oppose, say, two charges to run concurrent. That is done frequently. With presumptive there is less maneuverability. If there are arguable mitigating factors you can ask the state not to oppose the mitigators, but you cannot change the number (length of sentence) very much. (Fairbanks public defense attorney)

In 5 to 10% of my cases, a ceiling sentence will be offered. (rural prosecutor)

There are different kinds [of sentence agreements]. In 35% of my cases, the state will agree to a cap on what they will ask for; in 50% of my cases the defense and the state agree to a sentence but it is not binding on the court; in 5% or less, Rule 11; and in 10% of my cases, we will have open sentencing. (rural private defense attorney)

Pretty rare to have Rule 11s -- less than 10%. [There is] some kind of sentence agreement in 30% of cases, a consensus of what the sentence should be. Rare to have a case where parties disagree widely. Assault and battery is one situation, especially domestic violence. (Anchorage judge)

The DA will agree not to argue for more than x number of years or won't argue against an SIS. (former Anchorage public defense attorney)

First or second time narcotic-related defendants will agree to serve time at a treatment center in lieu of incarceration. (Southeast judge)

One percent are sentence agreements; 19% are sentence recommendations; and 5% to 10% are a cap. Sentence is discussed with the defense attorney prior to the sentencing hearing [but after conviction]. (Southeast prosecutor)

[Sentence agreements are in] 25% of serious felonies. Rule 11 agreements rarely happen. The state will give a general statement of jail time, but there is no binding agreement. It is a matter of honor between the DA and the defense bar. (Southeast private defense attorney)

The interviews confirmed the existence of sentence recommendations that did not reach the level of specificity and commitment as those found before the ban. Defendant interviews also supported the absence of specific sentence recommendations and the presence of less formal agreements regarding the prosecutor's arguments at sentencing. Of the 29 defendants interviewed¹⁴⁷, only four appeared to have had a strong agreement on the sentence:

The Court of Appeals overturned the conviction. My case was to be retried....then I accepted the state's plea bargain offer to plead nolo....The state said they would recommend 15 years with seven suspended and five years probation. And, that is the sentence I got. (Defendant convicted of 2 counts of sexual abuse of a minor I).

[I was offered] ten years with five suspended on each of the two counts, concurrent. That is what I received. (Defendant convicted of two counts of sexual abuse of a minor II; had originally been charged also with kidnapping.)

Other defendants had the types of agreements described by many of the attorneys above:

I was on probation at the time I was charged. The D.A. agreed not to file aggravators if we would not file mitigators. I knew I was going to get four years presumptive along with the 18 months of time left on the probation violation, to run concurrent. (Defendant convicted of one count of burglary I and a probation violation)

The state told me that if I would testify for them against the guy I had bought from, they would cut my sentence in half. But they did not really cut it in half. I had no agreement in writing. I was sentenced to seven and a half years with drug treatment and five years probation. (Defendant convicted of

¹⁴⁷ The 29 defendants, as noted earlier in this report (see supra at Chapter II, Part C, Trials) were not selected at random. All were incarcerated, because obtaining interviews with defendants on probation proved very difficult. Corrections officers were asked to recommend defendants who would be articulate and willing to participate in an interview. No attempt was made to select for offenders who might have had plea agreements, and there is no reason to think that the group was not representative of most defendants with comparable offenses.

two counts of misconduct involving a controlled substance II, a class A felony. Defendant had two prior felonies and was subject to a 15-year presumptive sentence)

The state agreed to drop the kidnapping and robbery charges if I would plead to the sexual assault I charges. The bargain was set up after I waived my right to grand jury. The charges dropped would not be mentioned at sentencing. The state would recommend two eight-year terms to run concurrent. I had three mitigators, but the attorney did not bring them out because he didn't feel they were strong enough. (Defendant convicted of two counts of sexual assault I; the "bargain" is lessened in its impact by the fact that the state is only recommending that the defendant receive the presumptive sentence that it is likely he would have received anyway)

I was allowed to plead nolo to murder II. The DA agreed to recommend a twenty-year cap. (Defendant convicted of one count of murder II. Twenty to thirty years is the benchmark sentence for Murder II set by the Court of Appeals in Page v. State, 657 P.2d 850 (Alaska Ct. App. 1983))

The interviews with defendants also confirmed the attorney and judge interviews that suggested that many defendants received only open sentencing with neither a specific agreement regarding sentence nor informally-agreed upon recommendations. Fully half of the defendants said that they had no agreement of any sort regarding the sentence. (It should be reiterated here, however, that only six of the 29 defendants did not have one or more charges either reduced or dismissed).

A defense manual prepared for members of the Alaska Bar Association noted in several places that while charge bargaining was common, sentence bargaining (referred to as "classic plea bargaining") was not.¹⁴⁸ Another volume of Continuing Legal Education materials on sentencing prepared for the Alaska Bar Association mentions negotiations in the context of avoiding problems in the presentence report:

¹⁴⁸ S. ORLANSKY, supra note 26, at 7.

A. During negotiations for a plea

Try to negotiate that the dismissed or reduced counts will not be considered at sentencing. Try to stipulate to a version of facts both sides will accept. Get these concessions in writing or on the record....The state and the defense may agree not to file or not to contest reasonably debatable aggravators and mitigators. Connolly v. State, 758 P.2d 633, 638 (Alaska App. 1988). If that is part of the deal, make it explicit.¹⁴⁹

3. Sentencing Benefit from Plea Bargaining

How much does the average defendant benefit from plea bargaining, whether charge reductions and dismissals or recommendations made (or not made) at the time of sentencing by the prosecutor are considered? Judges and attorneys varied in their estimates, naturally, depending upon their location and their role in the justice system. Defense attorneys tended to perceive a greater amount of benefit than did prosecutors:

I think that defendants will save themselves at least six months if they bargain on the sentence; e.g., cocaine cases with an agreed-to SIS can save from six months to two years. (Anchorage judge)

Probably not much. My perception is that the deal that is offered may look like a great deal to the defendant, but in reality, in terms of time served, it doesn't make that much difference. (Anchorage prosecutor)

Having the charges reduced or getting a concurrent versus a consecutive sentence will benefit the defendant some. And the defendant may receive some benefit from limiting their exposure to the judge. But, at sentencing, the defendant will probably come out with the same sentence. (former Anchorage public defender)

A lot depends upon the judge you go before. 95% of the time the DA is going to recommend something that the judge is going to give. We now have more specific case law and

¹⁴⁹ Orlansky, "Presentencing Procedures, Particularly Challenges to Negative Information in the Presentence Report," in FEDERAL AND STATE SENTENCING PROCEDURES AND ISSUES, at 000012 (1981) (Prepared for Alaska Bar Association CLE course).

unless it is a strict Rule 11 plea, the DA is not tying the judge's hands. The defendant benefits some but not a whole lot. I think the system benefits more because the defendant agrees to plead thinking he is going to get a better deal than he actually does get. (Southcentral judge)

A lesser sentence but probably not much....They end up being sentenced as much as they would have been if they had gone to trial....Avoiding trial is a much bigger benefit. (Southeast judge)

I think it is really artificial. It is peace of mind for the defendant. He thinks he knows in advance what the sentence will be. (Southeast prosecutor)

It varies, based upon a defendant's prior record. If a defendant has a clean record, the defendant will tend to benefit a lot. If the defendant has a bad record, but the state's case is weak, the defendant may benefit. If the defendant has a bad record and the state's case is good, the defendant won't benefit much. Here the changes from one DA to another dramatically affect how the system works. (Rural defense attorney)

One attorney succinctly expressed the overall opinion that charge negotiations were more beneficial than sentence recommendations:

I don't think the defendant benefits at all. The benefits from sentence negotiation are limited. Benefits from charge negotiation are much higher. There is the view that the defendants don't want the uncertainty of an open sentence. If it looks like there is a deal, the judge will generally follow it; or allow the defendant to withdraw the plea. (Rural prosecutor)

His comment, "If it looks like there is a deal, the judge will generally follow it," also emphasizes the informal nature of many plea negotiations. However, charge bargaining also could lead to unwarranted disparities in sentencing:

The opportunity for unfairness to defendant is increased due to the opportunity for charge bargaining. The beauty of

charge bargaining is that you can't compare deals to see if everyone is treated the same. (Former Fairbanks judge)

a. Charge Reduction Benefit. Another way of estimating the benefit to the defendant is to look at the difference in sentences for various specific offenses. Tables C-2 through C-7 (Appendix C) give the mean sentences for all convicted offenses studied. If the defendant's charge was reduced from Assault I (mean sentence = 78.5 months; presumptive for all offenders) to Assault II (mean sentence = 24.6 months; presumptive only for repeat offenders), the sentence was about 54 months lower. If the charge was reduced from Assault II to Assault III (mean sentence = 16.2 months; presumptive only for repeat offenders), the savings in jail time was considerably less, only about 8 months. A reduction to misdemeanor Assault IV (mean sentence = 3.6 months; presumptive not applicable to misdemeanors) was of greater benefit, especially because the defendant would not have a felony conviction of record that would trigger presumptive sentencing in case of a future felony conviction.

b. Charge Dismissal Benefit. In addition to the benefit from charge reductions, defendants also appeared to benefit, to a lesser degree, from dismissal of charges. Because offenders convicted of more than one offense can, under some circumstances, be sentenced to consecutive terms, dismissal of all but one charge provides the greatest certainty of benefit. If the additional charges are part of a continuous criminal episode, or other conditions are met, the offender may be sentenced to concurrent terms.¹⁵⁰ The defendant may benefit more, however, if sentenced in the future for another felony, because the number of offenses convicted could change his or her status as a repeat offender.

c. Time Served Benefit. One form of plea bargaining, for time served, was found primarily in Anchorage. A former Anchorage prosecutor described the system:

¹⁵⁰ See Di Pietro, supra note 92, at 289.

[The intake attorney] in some instances will agree to reduce a case to a misdemeanor if the defendant will agree to waive indictment and spend 60 to 90 days in jail before the deal is finalized.

A judge confirmed the practice:

The technique for sentence negotiations at the DA's office for a defendant charged with a felony can be setting the defendant's case aside for 30 to 90 days while the defendant stays in jail. After an agreed-upon time has elapsed, then the case is reduced to a misdemeanor. The defense makes a recommendation [to the judge] to time served and the state does not object. (Anchorage judge)

Defense attorneys commented:

The DA will reduce to a misdemeanor but won't take the action until the defendant has done time up front. This is done in less serious cases. (Anchorage public defense attorney)

In less than 10% of my cases the defendant agrees to waive his right to a preliminary hearing. The defendant agrees to set off the hearing for an agreed-to amount of time. Then a plea is entered and the defendant is released for time served. (Anchorage private defense attorney)

One public defense attorney described a similar procedure in Fairbanks:

[The prosecutor] will reduce DWI [Driving While Intoxicated] to reckless driving if the defendant agrees to spend three days in jail.¹⁵¹

However, this was the only comment in the interviews about this procedure for any community outside of Anchorage.

¹⁵¹ The standard sentence for first offense drunk driving in Alaska is 72 consecutive hours in jail, plus a fine, brief license suspension and referral to an alcohol screening program.

The practice emphasizes the ability of the prosecutor to determine the defendant's sentence, in this situation even more directly than by adjusting the level or number of charges. Here the prosecutor is determining the amount of time that he believes the defendant should spend in jail; obtaining an agreement from the defendant and defense attorney to that amount of time; and obtaining written waivers of speedy trial, grand jury, and other pre-trial rights from the defense. After the pre-determined amount of time has elapsed, the prosecutor reduces the charge, the defendant changes his or her plea to guilty (or nolo), and the prosecutor recommends to the judge that the defendant be sentenced to time served. An Anchorage judge who had handled a number of these cases said:

It's alright with me if he [the intake attorney] does this; he has good judgment. Often the defendant has served more time than I would have given him, but he has a misdemeanor instead of a felony on his record.

Most Anchorage attorneys interviewed about this practice agreed with the judge that it was acceptable, and generally benefitted the defendant because of the charge reduction.

4. Presumptive Sentencing and Plea Bargaining

One reason often offered for the limited value of sentence recommendations as compared to the greater worth of charge negotiations was the presence of presumptive sentencing. Many attorneys said that presumptive sentencing limited a judge's choices sufficiently to make negotiations about the sentence of little value. If the charge could be reduced to a non-presumptive charge, the benefit to the defendant was much greater:

Presumptive sentencing typically gives a defendant more time than the judge normally would...The disadvantage when you combine presumptive sentence and plea bargaining and the defendant is not guilty you'll find [innocent] defendants pleading out also. Also another possibility is the defendant who is overcharged and yet agrees to plead to avoid being found guilty of a presumptive. (Former Anchorage prosecutor)

The defendant benefits substantially in terms of jail time, but the only reason he benefits is because of presumptive sentencing. I started with a client indicted with 23 counts in a sex abuse case. I pled him to three of the 23. He got six years to serve....The legislature has created a sentencing scheme that is so punitive that you often charge bargain the case to avoid the presumptive sentence. The bargained sentence is more fair. (Southeast defense attorney)

Presumptive sentencing increases the need for plea bargaining—especially for the DAs. More justice is done in the DAs office than in the courtroom. (SE private defense attorney)

I was uncomfortable with charge negotiations, but I would charge negotiate if, for example, I thought the presumptive sentence was too high in the case... (Former Anchorage prosecutor)

An unusual reason for reducing the charge to avoid presumptive sentencing was given by a prosecutor in a rural area:

Presumptive sentencing is a product of urban Alaska. The life expectancy in the rural areas of Alaska is shorter; therefore, one year of jail may not be valued the same.

Presumptive sentences also encouraged charge bargaining for other reasons. If the defendant committed another felony in the future, any additional charge(s) not dismissed could be used to increase the sentence imposed at a later date because repeat offenders were subject to longer presumptive sentences if they had a greater number of prior felony convictions.¹⁵² This factor was given varying weights by attorneys: some focussed on the lack of importance of the additional charges in determining the current sentence; others attended to the possible effect on future sentences.

Various commentators have suggested that the structured sentencing systems comparable to Alaska's presumptive sentencing would encourage charge bargaining.

¹⁵² See ALASKA STAT. § 12.55.125 (1989). Prior felony conviction is defined in id. § 12.55.145 (1984).

Charge bargaining appeared to increase in Minnesota, for example, for some offenses after the introduction of sentencing guidelines.¹⁵³ In Omaha, Nebraska, passage of a law making third-offense drunk driving a felony resulted in 42% of the "third-offense" charges filed being plea bargained down to "second-offense" charges.¹⁵⁴

The evidence in Alaska appears to suggest that the percentage of charge reductions did rise after the 1982-1983 amendments increased the severity of presumptive sentences for some offenses and greatly expanded the number of defendants to whom presumptive sentencing would apply. However, the patterns of charge reductions do not clearly support a hypothesis that the increase in charge reductions was a direct result of the changes in presumptive sentencing.

For example, the definitions of sexual offenses were drastically revised in 1983, and penalties were increased for most sexual offenses. The rates of charge reductions (see Table 7) did not increase after 1984; they dropped in 1985 from 31% to 27%, increased in 1986 to 33%, and increased again in 1987 to 35%. The differences are not substantial in either direction, and do not suggest that the changes in either the code or the sentences played a role.

The charge reduction rates for Robbery I, which became subject to a five-year presumptive sentence for first felony offenders in 1983¹⁵⁵ also declined, from 31% in 1984 to 6% in 1985. From there, they increased sharply, rising to 28% in 1986 and 46% in 1987. Although some attorneys thought that the increasing amounts of charge

¹⁵³ Cohen and Tonry, "Sentencing Reforms and Their Impacts," in 1 RESEARCH ON SENTENCING: THE SEARCH FOR REFORM 426 (1983). Cohen and Tonry cited the Minnesota Sentencing Guidelines Commission report that showed that "...the proportion of charge reductions increased for cases with low criminal history scores—fewer cases were actually convicted of aggravated robbery. There were apparently adjustments in case processing to avoid imposing the prescribed prison term for marginally serious defendants when prison was not deemed appropriate in every case by court personnel. With high criminal history scores, however, the proportion of charge reductions declined...."

¹⁵⁴ S. WALKER, SENSE AND NONSENSE ABOUT CRIME 110 (2d ed. 1989).

¹⁵⁵ The presumptive sentence was seven years for first offenders if a gun was used or if the victim was physically harmed. ALASKA STAT. § 12.55.125(1) and (2) (1989).

bargaining after 1985 were related to the pressure of presumptive sentences for first felony offenders, it appeared likely that other factors were more important. Chief among these, as noted earlier, were the changes in personnel in the Attorney General's office, and the budget constraints related to declining state revenues because of the drop in world oil prices.

5. Summary

The relationship between presumptive sentencing and the ban on plea bargaining was complicated by the striking demographic and economic changes taking place in Alaska throughout the 1980s. Some of the state's justice system problems that were commonly attributed to the plea bargaining ban, or to presumptive sentencing, or both, were often better explained by reference to the state's revenue ups and downs, or to the dramatically increased numbers of convictions resulting from increased enforcement efforts in the early 1980s.¹⁵⁶ Many attorneys believed that presumptive sentencing, especially for first offenders, encouraged or forced charge bargaining, but the statistical evidence did not provide any strong support for that hypothesis.

¹⁵⁶ See T. CARNS, supra note 108, at 54-61, for a detailed discussion of these changes. The analysis shows that neither increased population (up by 30%), nor higher crime rate (reported crime increased by 16% between 1980 and 1984) explained the 100% increase in the number of convicted offenders between 1980 and 1984. Criminal justice agency operating budget increases appeared to be more closely related to the increase in convictions. The report estimated that 39.7% of the increased total prison time between 1980 and 1984 was due to the increased number of convictions, 18.7% was due to the fact that the 1984 convictions contained a higher percentage of more serious charges, and 41.6% was due to the combined effects of presumptive sentencing, reclassification of sexual and drug offenses, and other policy changes (Figure 6 at 81).

REFERENCES

REFERENCES

- ALASKA COURT SYSTEM (1974 through 1989). Annual Report(s). Anchorage, Ak.: Alaska Court System.
- ALASKA DEPARTMENT OF COMMERCE AND ECONOMIC DEVELOPMENT (1985). The Alaska Economic and Statistical Review, 1984. Juneau, Ak.: Alaska Department of Commerce and Economic Development.
- ALASKA DEPARTMENT OF CORRECTIONS. (1989). Annual Report FY 88. Juneau, Ak.: Department of Corrections.
- ALASKA DEPARTMENT OF LABOR (1989). Alaska Population Overview: 1986 and Provisional 1987 Estimates. Juneau, Ak.: Alaska Department of Labor.
- ALASKA DEPARTMENT OF PUBLIC SAFETY. (1987). Crime in Alaska. Juneau, AK.: Department of Public Safety.
- ALASKA DEPARTMENT OF PUBLIC SAFETY. (1986). Crime in Alaska. Juneau, Ak.: Department of Public Safety.
- ALASKA JUDICIAL COUNCIL (1977). Interim Report on the Elimination of Plea Bargaining. Anchorage, Ak.: Alaska Judicial Council.
- ALASKA JUDICIAL COUNCIL (1989) Fourteenth Report: 1987 - 1988 to the Legislature and Supreme Court. Anchorage, Ak.: Alaska Judicial Council.
- ALBONETTI, C. (1986) "Criminality, Prosecutorial Screening, and Uncertainty: Toward a Theory of Discretionary Decision Making in Felony Case Processings," Criminology 24(4): 623 - 644.
- AUSTIN, J. and BROWN, M. (1989) "Ranking the Nation's Most Punitive and Costly States," Focus. San Francisco: National Council on Crime and Delinquency.

- BARNES, A. (1988). Disparities Between Felony Charges at Time of Arrest and Those at Time of Prosecution: 1984 Alaska OBTS Analysis. Anchorage, Ak.: Justice Center, University of Alaska Anchorage.
- BARNES, A. (1989) "Felonies Prosecuted in 1984," Alaska Justice Forum 5(4): 2, 4.
- BARNES, A. and McCLEARY, R. (1985). Alaska Correctional Requirements: A Forecast of Prison Population Through the Year 2000. Anchorage, Ak.: Justice Center, University of Alaska Anchorage.
- BAUM, L. (1986) American Courts: Process and Policy. Boston: Houghton Mifflin Company.
- BENCH/BAR DELAY REDUCTION TASK FORCE OF KING COUNTY. (1989) Report and Plan. Seattle, Wa.: King County Superior Court.
- BLUMSTEIN, A. (1988) "Prison Populations: A System Out of Control?" IN M. Tonry and N. Morris (Eds.) Crime and Justice: A Review of Research, pp. 231 - 266.
- BLUMSTEIN, A., COHEN, J., MARTIN, S., and TONRY, M. (Eds.) (1983) Research on Sentencing: The Search for Reform, Vols. I and II. Washington, D. C.: National Academy Press.
- BOHM, R. (1987) "Myths About Criminology and Criminal Justice: A Review Essay," Justice Quarterly 4(4): 631 - 642.
- BOLAND, B. and FORST, B. (1984) "The Prevalence of Guilty Pleas," Special Report. Rockville, Md.: Bureau of Justice Statistics.
- BOLAND, B., CONLY, C., WARNER, L., SONES, R., MARTIN, W. (1989) The Prosecution of Felony Arrests. Washington, D.C.: U.S. Department of Justice.
- CARNS, T. (1987) Alaska Felony Sentences: 1984. Anchorage, Ak.: Alaska Judicial Council.

- CHURCH, T. et al. (1978). Justice Delayed: The Pace of Litigation in Urban Trial Courts. National Center for State Courts.
- CLARKE, S. (1987) Felony Sentencing in North Carolina 1976 - 1986: Effects of Presumptive Sentencing Legislation. Chapel Hill, N.C.: Institute of Government, University of North Carolina at Chapel Hill.
- CRAMER, J. (1981) "Judicial Supervision of the Guilty Plea Hearing." IN J. A. Cramer (Ed.) Courts and Judges (pp. 173- 195). Beverly Hills: Sage Publications.
- CUNNIFF, M. (1985) "Felony Sentencing in 18 Local Jurisdictions," Special Report. Rockville, Md.: Bureau of Justice Statistics.
- CUTLER, B. (1975) Sentencing in Alaska: A Description of the Process and Summary of Statistical Data for 1973. Anchorage, Ak.: Alaska Judicial Council.
- DERSHOWITZ, A. (1976) Fair and Certain Punishment: Report of the Twentieth Century Fund Task Force on Criminal Sentencing. NEED PUBLISHER.
- FINE, R. (1986). Escape of the Guilty. New York: Dodd, Mead & Company.
- FRIED, Neal. (April 1989) "Alaska's Employment Scene," Alaska Economic Trends (AK. DEP'T. LABOR)
- HERMANN, M. (1984). "Adapting to Plea Bargaining: Prosecutors," IN G. Cole (Ed.) Criminal Justice: Law and Politics. NEED PUBLISHER.
- HICKEY, D. and STERN. B. (1985) Criminal Law Manual. Juneau, Ak.: Alaska Department of Law.
- INSTITUTE OF CRIMINAL LAW AND PROCEDURE, GEORGETOWN UNIVERSITY LAW CENTER. (Draft, 1978). The Study of Plea Bargaining in Local Jurisdictions: A Self-Study Manual. Washington, D.C.: National Institute of Law Enforcement and Criminal Justice, U.S. Department of Justice.

- INSTITUTE OF SOCIAL AND ECONOMIC RESEARCH. (1987) "Where Have All the Billions Gone?" Alaska Review of Social and Economic Conditions 24(1). Anchorage, Ak.: University of Alaska Anchorage.
- JOINT LEGISLATIVE COMMITTEE FOR REVISION OF THE PENAL CODE. (1980). Plea Bargaining. Sacramento, Ca.: California Legislature.
- LaFREE, G. (1985) "Adversarial and Nonadversarial Justice: A Comparison of Guilty Pleas and Trials," Criminology 23(2): 289 - 312.
- LANGAN, P. (1987) "State Felony Courts and Felony Laws," Bureau of Justice Statistics Bulletin. Rockville, Md.: Bureau of Justice Statistics.
- LANGAN, P. (1989) "Felony Sentences in State Courts," Bureau of Justice Statistics Bulletin. Rockville, Md.: Bureau of Justice Statistics.
- LAW AND SOCIETY REVIEW (1979) Plea Bargaining 13(2).
- LINDGREN, S. (1987) "Justice Expenditure and Employment, 1985," Bureau of Justice Statistics Bulletin. Rockville, Md.: Bureau of Justice Statistics.
- MAROULES, N. (1982) Alaska Felony Sentences: 1980. Anchorage, Ak.: Alaska Judicial Council.
- MAROULES, N. and WHITE, T. (1980) Alaska Felony Sentences: 1976 - 1979. Anchorage, Ak.: Alaska Judicial Council.
- MATHIESEN, T. (1990) Prison on Trial. London, England: Sage Publications.
- McCOY, C. (1984) "Determinate Sentencing, Plea Bargaining Bans, and Hydraulic Discretion in California," The Justice System Journal 9(3): 256 - 275.
- McDONALD, W. (1985) Plea Bargaining: Critical Issues and Common Practices. Washington, D.C.: National Institute of Justice.

McDONALD, W. (Ed.)(1979) The Prosecutor. Beverly Hills: Sage Publications.

McDONALD, W. and CRAMER, J. (Eds.) (1980) Plea Bargaining. Lexington: D.C. Heath and Company.

MEEKER, J. and PONTELL, H. (1985) "Court Caseloads, Plea Bargains, and Criminal Sanctions: The Effects of Section 17 P.C. in California," Criminology 23(1): 119 - 143.

MORRIS, N. and TONRY, M. (1990) Between Prison and Probation: Intermediate Punishments in a Rational Sentencing System. New York: Oxford University Press.

ORLANSKY, S. (198{ }) "Presentencing Procedures, Particularly Challenges to Negative Information in the Presentence Report," Federal and State Sentencing Procedures and Issues. NEED PUBLISHER AND PAGE NUMBERS.

ORLANSKY, S. (1989) Criminal Defense. Anchorage, Ak.: Alaska Bar Association CLE Program.

PARRY, D. (1989) "Alaska Crime Trends - 1963 to 1987," Alaska Justice Forum 5(4): 1, 5 - 7.

PAVOY, D. (1989) "Offense - Specific Crime Trends in Alaska - 1963 to 1987", Ak. Just. Forum 6(1):1, 4-7.

RICH, W., SUTTON, L. P., CLEAR, T., and SAKS, M. (1982) Sentencing By Mathematics: An Evaluation of the Early Attempts to Develop and Implement Sentencing Guidelines. Williamsburg, Va.: The National Center for State Courts.

ROM, R. (1989) "Sentencing in Alaska: Modern Justice in the Frontier State," Hamline Journal of Public Law and Policy 10(77) 77 - 119.

RUBINSTEIN, M. and CLARKE, S. (1977) Alaska Felony Sentencing Patterns: A Multivariate Statistical Analysis (1974 - 1976). Anchorage, Ak.: Alaska Judicial Council.

- RUBINSTEIN, M. and WHITE, T. (1979) "Plea Bargaining: Can Alaska Live Without It?," Judicature 62(6): 266 - 279.
- RUBINSTEIN, M., CLARKE, S., and WHITE, T. (1979) Interim Report of the Alaska Judicial Council on Findings of Apparent Racial Disparity in Sentencing. Anchorage, Ak.: Alaska Judicial Council
- RUBINSTEIN, M., WHITE, T., and CLARKE, S. (1978) The Effect of the Official Prohibition of Plea Bargaining on the Disposition of Felony Cases in the Alaska Criminal Courts. Anchorage, Ak.: Alaska Judicial Council. Re-published as Alaska Bans Plea Bargaining, 1980. Washington, D.C.: Government Printing Office.
- SANBORN, J. (1986) "A Historical Sketch of Plea Bargaining," Justice Quarterly 3(2): 111 - 138.
- SMITH, B. (1987). Telephone Survey of Criminal Justice Practitioners. Washington, D. C.: American Bar Association Criminal Justice Section.
- SPECIAL COMMITTEE ON CRIMINAL JUSTICE IN A FREE SOCIETY. (1988). Criminal Justice in Crisis. Washington, D. C.: American Bar Association.
- STERN, B. (1977) "The Proposed Alaska Revised Criminal Code," U.C.L.A.-Alaska Law Review 7(1): 1 - 74.
- STERN, B. (1985) "Presumptive Sentencing in Alaska," Alaska Law Review 2(2): 227 - 269.
- STERN, B. (1988) "Rethinking Manifest Injustice: Reflections Upon the Decisions of the Three-Judge Sentencing Panel," Alaska Law Review 5(1): 1 - 14.
- TONRY, M. (1988) "Structuring Sentencing," IN M. Tonry and N. Morris (Eds.) Crime and Justice: A Review of Research, pp. 267 - 337.
- TORGERSON, M. (1986) The Impact of Presumptive Sentencing on Alaska's Prison Population. Juneau: Alaska State Legislature House Research Agency.

- TRENT, G. (1989) "The Impact of Drug Arrests on the 1989 Alaska Prison Population," unpublished paper. Anchorage, Ak.: Alaska Judicial Council.
- VON HIRSCH, A., KNAPP, K. and TONRY, M. (1987) The Sentencing Commission and Its Guidelines. Boston: Northeastern University Press.
- WALKER, S. (1989) Sense and Nonsense About Crime: A Policy Guide. Pacific Grove, Ca.: Brooks/Cole Publishing Company.
- WEYRAUCH, P. (1987) "Alaska Court System Research Request 87.116," House Research Agency Memorandum. Juneau, Ak.: Legislative Research Agency.
- WILBANKS, W. (1987) The Myth of a Racist Criminal Justice System. Monterey, Ca.: Brooks/Cole Publishing Company.
- WILKERSON, G. (1983) A Special Report on the Alaska Criminal Justice System with Emphasis on the Department of Law's Criminal Division. Juneau, Ak.: Division of Legislative Audit.
- WINFREE, L.T., WOOLDREDGE, J., SELLERS, C., and BALLARD, V.S. (1990) "Parole Survival and Legislated Change: A Before/After Study of Parole Revocation Decision Making," Justice Quarterly 7(1): 151 - 173.

APPENDIX A

POLICY GUIDELINES MEMOS

MEMORANDUM

State of Alaska

TO: All District Attorneys
Criminal Division
Department of Law

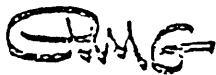
DATE: July 3, 1975

FILE NO:

TELEPHONE NO:

FROM: Avrum M. Gross
Attorney General

SUBJECT: Plea Bargaining



After our lengthy and heated discussions of last week on the referenced subject, I have given the matter a great deal of additional thought and have discussed it with Dan Hickey and with the Governor. As a result of these discussions, I wish to have the following policy implemented with respect to all adult criminal offenses in which charges have been filed on and after August 15, 1975:

(1) Commencing with offenses filed on and after August 15, District Attorneys and Assistant District Attorneys will refrain from engaging in plea negotiations with defendants designed to arrive at an agreement for entry of a plea of guilty in return for a particular sentence to be either recommended by the State or not opposed by the State pursuant to Criminal Rule 11(e). After the entry of a plea of guilty, the prosecuting attorney under circumstances described in No. 3 below is free to recommend an appropriate sentence or range of sentence to the court.

(2) While I was initially of the view that it would be necessary to abolish all sentence recommendations in order to insure that some form of sentence bargaining did not continue to occur, reflection has persuaded me that such a restriction would indicate a lack of faith in the District Attorneys and Assistant District Attorneys which I never meant to demonstrate. Consequently, if the District Attorney approves a sentence recommendation in a particular case prior to entry of a plea (though, as noted below, this should not occur in the general case), the contemplated recommendation may be transmitted to the defendant through his attorney in order that he might make up his own mind with respect to the entry of a plea. Again, I stress that I do not want bargaining over sentences and I assume that policy decision will be respected.

(3) In the majority of cases, I prefer that we employ open sentencing bringing to the court's attention all factors relevant to a consideration of sentence rather than

recommending a particular sentence. However, in light of our earlier discussions last week in Anchorage, I am willing to recognize that there are certain instances in which specific sentence recommendations are appropriate. Roughly, the circumstances in which a form of sentence recommendations will be appropriate are as follows:

(a) when the sentencing court specifically requests the prosecuting attorney to make a recommendation as to either a specific sentence or a form of sentence;

(b) when there are unusual aggravating or mitigating circumstances that dictate a specific recommendation;

(c) when the court has imposed a sentence which provides for a period of probation and recommendation is in respect to the conditions of probation.

Any proposal to make a specific sentence recommendation must first be reviewed and approved by the District Attorney to determine (a) whether in the particular case a recommendation is warranted and (b) whether the specific sentence proposed is consistent with sentences being imposed in similar cases in that district and other districts throughout the state. In each case where a specific sentence recommendation is made, a brief memo to the file should be prepared and endorsed by the District Attorney indicating what the sentence recommendation was, why it was felt appropriate and necessary and why it was determined to use specific sentencing as opposed to open sentencing. Copies of each such memorandum should be retained in a sentencing file maintained in each office and copies should be forwarded once a week to Dan Hickey in Juneau for maintenance of a statewide sentencing file.

(4) Plea negotiations with respect to multiple counts and the ultimate charge will continue to be permissible under Criminal Rule 11 as long as the charge to which a defendant enters a plea of guilty correctly reflects both the facts and the level of proof. In other words, while there continues to be nothing wrong with reducing a charge, reductions should not occur simply to obtain a plea of guilty.

(5) Like any general rule, there are going to be some exceptions to this policy. Any deviation, however, must first be approved by either Dan Hickey or myself. In

July 3, 1975

cases where we are dealing with co-conspirators or other similar type situations and a sentence bargain may be required to obtain a conviction, I would anticipate that we would approve it. In such cases I would, of course, lean extremely heavily on the recommendation of the District Attorney, but permission for sentence bargains will be given sparingly if at all.

I realize that, while the above policy reflects many of your concerns, it does not necessarily reflect all of your concerns. It is possible that we may have to try more cases and, if so, I will try my best to get additional help for us in the next legislature. I know it is going to make your individual work loads somewhat more difficult, though I hope not much more difficult. In return for this, hopefully we will be doing away with a technique which is generally considered, at least by a substantial segment of the public, as one of the least just aspects of the present justice system. It will also to a substantial degree put sentencing back in the courts, where I think it belongs, instead of it being a product of a negotiated arrangement.

I have held off implementing this policy immediately for one basic reason. Doing away with sentence bargaining may mean that some adjustments will have to be made in office procedures in order to accommodate the change. An effective screening of cases filed, for example, will have to be instituted in order to avoid filing cases which might be "bargained" under the existing system, but which could not be won at trial. We are going to have to be prepared to move people around between offices if the trial load gets too great in one place. It is entirely possible that immediately after implementation of the policy the Public Defender's office or private counsel may simply balk at pleading anyone, with the result that we will have a temporary pile-up of cases. I think if we make it clear that we will do everything we can to handle that pile-up, but not back off the policy, the situation will be temporary and after awhile things should return to something like normal.

I appreciate the fact that all of you were so frank with me when we discussed this in Anchorage last week. I hope now, having had a free discussion of our views, that we can implement this policy as smoothly as possible.

I will today inform the Public Defender's office of the forthcoming modification in procedure. I anticipate that private criminal defense attorneys will simply find out in due course.

AMG:as

TO: All District Attorneys
and
Assistant District Attorneys

DATE: July 24, 1975

FILE NO:

TELEPHONE NO:

FROM: Avrum M. Gross
Attorney General

SUBJECT: Plea Bargaining

I am sure you realize by now that what started as a discussion among ourselves as to new office policy has developed into a matter of statewide significance and national attention. The fact that we are going to try to end plea bargaining here has received comment in papers as far away as Washington, D.C. and New York. The Judicial Council, the court system and this office have been contacted by several national organizations who are anxious to do an in-depth study of what occurs once we embark on the new program.

For your reading pleasure, I am enclosing (1) an editorial from the "Washington Star", and (2) a brief discussion of some of the reasons for eliminating plea bargaining as outlined by the National Advisory Commission on Criminal Justice Standards and Goals in their study on courts. I bring these materials to your attention to emphasize the significance of what you as District Attorneys and Assistant District Attorneys are about to do. I realize as well as any of you how difficult this is going to be. There are many people who believe that it cannot be done--that the people within the criminal justice system will be unable to generate the effort and dedication that a change of this magnitude requires. I know, for instance, that every member of the criminal justice system, be it District Attorneys, defense counsel, or judges, is going to have to work harder at least for awhile. Trying more cases is going to mean greater preparation and more intense effort and that is asking a lot from people.

The attorneys who work in the District Attorneys' offices are professionals, and a little too old for a pep talk so I'll skip that approach. I do want to tell you, though, that if we can do this--if we can really make a change in the system to effectively eliminate sentence bargaining--the office will have accomplished something really meaningful. I think it will be something that each person in the office will be proud of. It would certainly be something the office would have a right to be proud about. In this day when government is subject to so much criticism, I think it would really be satisfying to those who work in government to do something which, while difficult, is truly recognized by the public as being valuable. I hope we can do it.

Now, with that behind, let me make a few specific comments on procedures which should be implemented as we embark upon this experiment. The key feature of the elimination of plea bargaining is that we are going to be faced with more trials. Our problem, then, is how to handle those trials with the manpower we now have available. It may be that experience shows that we need more personnel, but I want the program initially to operate under the assumption that we are going to do it with the people we now have. If that is the case, we are going to have to develop means of keeping the trials manageable. Toward that end I have two basic suggestions:

1. There Must Be a Careful Screening of Cases.

A. As a basic rule, the final decision on charges should be made by the District Attorney who is going to end up having to prosecute those charges in court. In some judicial districts we have found ourselves in the position of having to back up or back away from decisions made by Public Safety officials as to what charge should be filed. I will be meeting with Commissioner Burton to make very clear that we will make that decision in the future and I want each of you to make clear to the city or state police with whom you work that it is a prosecutor's function to decide what charge can be proven in court rather than a policeman's function. If you do that, you should be in a position to hold off filing those cases which should not be filed in the first instance, and when cases should be filed to file them in the appropriate category of offense. If charges are filed by police officers, and in your opinion they are not justified, notify the officer, discuss it with him, but in the end promptly modify the charge to what you feel is appropriate.

B. Preliminary figures I have obtained from the court system indicate that the percentage of guilty pleas or convictions on felonies filed in some areas of the state is extremely low. In one judicial district it is less than 60 per cent. I assume that rather than indicating that we are losing cases, this indicates that many cases are being filed as felonies and then being reduced to misdemeanors. When the percentage gets that high, it is indicative of the fact that the original charges are not appropriate. If a large percentage of cases end up as misdemeanors they probably should be filed that way in the first instance. I stress to you, for reasons I will mention later, that you should file the charge you can prove. Don't file charges which you cannot prove in the assumption that they will be reduced later.

July 24, 1975

C. Some charges should not be filed at all. Merely because you are brought a police file does not mean that you are required to file a criminal charge. In some cases the facts simply will not justify criminal prosecution either because it is not warranted in the interest of justice or because technically we could not prove the charge. If that is the case, do not file the charge in the first instance. I am not interested in seeing the office file Assault with a Deadly Weapon charges and then reduce them to simple Assaults with suspended impositions of sentence with no fine or jail time purely because we never had a case in the first place. The time spent on those kinds of cases would be better spent on the cases we can prove. Merely having a conviction statistic proves nothing--if we prosecute somebody and we believe it is warranted, we should be seeking a result justified by the offense and not simply obtaining convictions with meaningless penalties.

In this vein, consider diversionary programs carefully. Before August 15 we will have had meetings with Health and Social Services, particularly Corrections, to try to outline for the various prosecutors meaningful alternatives to criminal procedures in situations where criminal procedures are not warranted. Alcoholism rehabilitation instead of drunk and disorderly prosecutions is perhaps the classic example, but we will try to make available to you as broad a spectrum of diversionary programs as we can. If they are meaningful alternatives, use them.

D. In my initial memorandum on this subject, I stated that while prosecutors should feel free to reduce charges if facts warrant, I did not want charges reduced simply to obtain guilty pleas. I am sure with the elimination of sentence bargaining there will be a great temptation to charge heavily under the assumption that you can later reduce the charge in exchange for a guilty plea. I do not want the office to do that for several reasons. First, it would, in my opinion, violate the spirit of what we are trying to do, which is to insure that people are charged fairly, tried fairly and sentenced fairly for offenses that they have committed. Second, and of a more practical bent, I think you will have more chance of obtaining a guilty plea if you make the charge realistic in the first instance. Once you establish the atmosphere of bargaining with the defendant, be it over charge or sentence, it

July 24, 1975

is difficult to stop the process. If a defendant feels that the state has charged him properly, there is more of a chance of him responding in a non-contentious manner. Again I stress, charge what you can prove and then do not deviate from it unless subsequent facts convince you that you were erroneus in your initial conclusion.

The third reason you should not use reduction of charges as a means to obtain guilty pleas is that I am sure you all realize you are going to be very much in the public eye in this experience. There are many people who believe that this change cannot be accomplished, and they are going to look for any example to prove that. If you use charge bargaining to obtain guilty pleas and not because the facts warrant a reduction in charge, the office is going to be criticized justifiably for doing something that we said we would not do. I want to give this system a fair try, and accordingly only reduce charges when the level of proof warrants.

II. Efficiency in Trial Procedures.

More effective screening of cases and diversionary programs may help us handle some of the case load we are bound to face, but the major efforts should be spent at increasing the efficiency of the office to actually try criminal cases. Right now, 94 per cent of criminal cases which are filed are plea bargained. We can expect that number to drop substantially with the result that no matter how you analyze it we are going to have to try a great many more cases than we are now trying.

Presently, after the initial complaint is filed, negotiations take place with defense counsel over the appropriaten of the charge, continued conferences take place, and eventually as a result of either preliminary proceedings or continuous negotiation, some agreement is reached on sentence. The time previously used negotiating with defense counsel over reaching a plea bargain should now be devoted to preparing for and trying cases. We will be meeting with court officials and officials from the Department of Public Safety and local police departments to try and insure that we minimize the time wasted in bringing a case to trial. What we hope to accomplish and what you should strive for is a system by which (1) when a case is filed it is immediately docketed for a trial date and an omnibus hearing and (2) under the assumption that the case will go to trial, witnesses should be scheduled to appear at the date set. At the omnibus hearing, open files should be the policy if it already is not in the various District Attorney's

July 24, 1975

offices. While efforts should be made at the omnibus hearing to find out whether the defendant will enter a plea (efforts I'm sure that will be promoted by the judge), assume that the defendant will not plead guilty and prepare accordingly.

If continuances are sought it should be the policy of the office to grant them sparingly. There are, of course, instances in which continuances are inevitable, but the entire shift from plea bargaining is going to require additional efficiency and, if that is so, efforts should be made to keep continuances to a minimum. If judges want to grant continuances on their own, they are of course free to do so, but if we get into the habit of consenting to continuances, we are going to run into some serious administrative problems when cases which are reasonably scheduled initially start to pile up on each other. In every case in which a continuance is obtained, of course obtain a waiver of the four-month rule.

Since we will be having many more trials, it may be desirable in multi-member offices to have a clerical person designated whose sole function it is to get the right witnesses to the right place for the right trials on the right dates. It is going to be a bit much to ask for the attorney who is trying the case to handle his own administrative arrangements. Dan Hickey will be working with each office in an effort to improve the handling of those administrative details so that the attorneys themselves are freed as much as possible for actual trial and preparation for trial.

I think if you assume that every case is going to trial and act accordingly, you will find that you pick up a lot of time which otherwise was lost when we dealt with cases under the assumption they would bargain out. If the defendant eventually does enter a plea, fine. But assume from the outset that he will not.

III. Miscellaneous Matters.

A. In many cases, judges or defense counsel are going to try to get around the policy of changing plea bargaining by simply asking District Attorneys what they will recommend in a particular case prior to the time the defendant enters a plea. Except in the extremely unusual case the answer to this should be that no decision will be made until the defendant enters the plea and that in any event we anticipate in most cases to go with open sentencing. If you make this clear at the outset of this program, it will make it lots easier for you in the future.

July 24, 1975

As noted in the original memo, District Attorneys must approve any specific sentence recommendation and I do not want specific sentence recommendations made in criminal cases before entry of plea except in the most unusual sort of case.

An offshoot of this appeared in a recent conference I had with the Superior Court judges in Anchorage. I was advised that judges might attempt a new form of plea bargaining directly by calling the defendant and his attorney into chambers, advising him what sentence the judge would give him if he pled guilty "on the basis of facts now known to the judge", and further advising him that if he did not plead guilty all bets were off. I was asked whether I would forbid prosecutors to participate in this procedure. I advised that if a judge called a prosecutor to a conference he would of course attend, but that we would not make any recommendation for sentence prior to the entry of a plea. I further advised that I thought this would be extremely bad policy because (1) it would make the present system of plea bargaining even worse, (2) it would legally amount to coercion on the part of a judge to obtain a guilty plea, and (3) a defendant who entered a guilty plea would very quickly apply for post-conviction relief and my guess is would obtain it. If you are called to such conferences, of course feel free to attend but I think you should state very clearly that the Department of Law disagrees with the concept of a judge "bargaining" impliedly or directly with a defendant and in no way participate in the meeting other than to physically attend. I told the judges that while I knew of their hesitancy about doing away with plea bargaining, I hoped they would give the system a fair try. I know that it will require them to try more criminal cases, and I sympathize with their concerns about that. Nonetheless they have a responsibility to try criminal cases if necessary and I have confidence that they will do whatever is necessary to perform that responsibility.

After the 15th of August I will try to spend as much time in the District Attorneys' offices around the state as I can. I will be available to listen to whatever suggestions you may have for the improvement of the program. Do not hesitate to make such suggestions. At the same time, the Governor is firmly committed to this program, I am firmly committed to it, and I hope that everyone in the department will do their absolute best to make a change which is, in my opinion, long overdue in the criminal justice system.

AMG:as
Enclosures

MEMORANDUM

State of Alaska

TO: All District Attorneys
and Assistant District Attorneys

DATE: June 30, 1976

FILE NO:

TELEPHONE NO:

FROM: Avrum M. Gross
Attorney General *E. M. G.*

SUBJECT: Plea Bargaining

I found our general discussion concerning plea bargaining at the recent District Attorneys' Conference to be very helpful and appreciate the open expression of ideas and views offered by all of you. We have been operating under the present procedure for nearly a year now, and while it has had some unanticipated effects, the policy does not seem to be creating the general administrative chaos that some people seemed to believe would develop. While I plan to continue the present policy now in effect, I think our discussion at the conference indicates there are a few things which should be stressed.

First of all, I want to emphasize the thrust of the initial statement set out in my memorandum of July 3, 1975, to all of you concerning charge bargaining. When we implemented the original policy, I stated that I wanted charges which were initially filed to accurately reflect the level of available proof at that time and that I did not want overcharging, either in terms of the number of counts or the magnitude of the charge. I realize that to some degree it is inevitable that there may be reductions of charges or dismissals of charges once a defendant determines to enter a plea. But I think it is time to tighten up on initial charging itself. Some District Attorneys remarked to me at the conference that they were bringing multiple charges and multiple counts as a matter of "tactics." I do not want that practice to continue. I want you to file the charge or charges that you think you can prove and stick with them until and unless you are convinced they are not proper charges. I reiterate that I do not want charges reduced or dismissed in order to obtain a plea. In essence, I do not want you to set up a charge bargaining situation by the way the initial charges are filed. Charges should be dismissed or decreased only under unusual circumstances, only then when justified by the facts in a case, and not as a quid pro quo for the entry of a plea of guilty.

One possibility that has been recently suggested to me regarding the practice of charge bargaining is the use of some sort of a form, given to the defendant or his counsel, which indicates that a charge is being reduced or dismissed for reasons stated thereon and not in return for a plea of guilty to one or more offenses. The form would then state that the defendant is free to proceed to trial on the charge or charges remaining. I prefer not to have to employ this type of procedure since I feel that we can continue to rely on a good faith effort by each of you to implement the policy with respect to plea bargaining that has been articulated here and in previous memoranda on the subject.

I realize there are times when the elements of the offense may be highly technical, as a result of which two similar type counts are filed to protect yourself dependent upon the way the evidence develops. In that instance you obviously only intend to seek a conviction on one or the other, and therefore it obviously makes sense to dismiss one if a plea is entered to the other count. This is not the situation I am trying to prevent.

What I am trying to prevent is deliberate overcharging. That will not be easy to change, but I want a real effort made. I know that even if the facts warrant reduction on a charge, some of you will be hesitant to make it if you do not get some sort of implied or express indication from the defendant that he will plead guilty. After all, if the defendant does not want to plead, why give him the break of reducing ADW to A&B? The answer lies in the fact that if it is the kind of case that should be reduced to an A&B, it is the kind of case that should be filed as an A&B or reduced to one if it was initially filed at a higher level. I think over the years much of charging has become linked with the techniques of plea bargaining, to the point where filing the appropriate initial charge for an offense is not gauged in terms of what would be appropriate for conviction, but rather what would be appropriate for bargaining purposes. If we are not going to bargain, that should not be a relevant consideration.

June 30, 1976

- 3 -

The second thing I want to clarify is that henceforth I do not want District Attorneys or Assistant District Attorneys participating in sentence conferences with a judge prior to the entry of a plea. By now, each office should have received a copy of the Second Circuit opinion in United States v. Werker. In the remote event you have not, I am enclosing a copy with this memo, and it should be made available throughout each office. If a judge persists on holding a pre-plea sentence conference, either at the request of a defense counsel or on the judge's own motion, I do not want the office to participate, and in fact I want the office to strongly protest any such conference. I think the practice of judicial negotiations with a defendant is an extremely bad one and I have made my feelings known on the matter to both the Supreme Court and the Superior Court. We are presently in the process of finalizing a proposal to submit to the Supreme Court for an amendment to Criminal Rule 11 along the lines of the federal rule construed in Werker which would essentially prohibit trial courts from participating in a process of negotiating directly or indirectly with a defendant or his attorney with the objective of securing the entry of a plea of guilty.

Lastly, I should note that it has been suggested that certain modifications be made with respect to some aspects of the present policy, namely that misdemeanors that are essentially administrative or regulatory in nature and fish and game violations be exempted from the policy; that some adjustment be made for prosecutions, particularly for misdemeanors, arising in bush communities; and that sentence recommendations be permitted more frequently and under less stringent guidelines. I would welcome further comment on these and any additional aspects of the policy from those of you who feel that your views have not to date been sufficiently made known. We are taking a hard look at proposals that have been made and will be meeting with certain District Attorneys shortly to explore possible modifications in depth.

AMG:as
Enclosure
cc: Dan Hickey

DEPARTMENT OF LAW

CRIMINAL DIVISION

POUCH KC - STATE CAPITOL
JUNEAU, ALASKA 99811

June 1, 1980

STANDARDS APPLICABLE TO
CASE SCREENING AND PLEA NEGOTIATIONS
(Effective July 1, 1980)

Introduction:

The material which follows has been developed to provide staff attorneys within the Criminal Division with policy guidelines pertaining to questions involving case screening, charging decisions and plea negotiations. It is essential to these guidelines to understand that the screening of cases and the exercise of charging discretion are on-going activities subject to a continuing review as cases are developed. Consequently, as new information comes to light, previous screening or charging decisions may and should be modified or reversed.

It should be stressed that these materials, particularly those applicable to screening, are guidelines. They are not cast in concrete. As facts and circumstances dictate they will be changed. Furthermore, it is not expected that charging decisions in every individual case will always fit wholly within these guideline. However, deviations from the guidelines should be infrequent, fully justified, and subject to supervisory review as required.

I. SCREENING

A. Definition: As used in these guidelines, screening refers to the first step in a prosecutor's consideration of a criminal case. It involves the initial determination of whether or not to commence legal action in the form of a criminal charge and the discretionary decision of a prosecutor to stop or alter, prior to trial or the entry of a plea of guilty, all formal proceedings against a person who has become involved in the criminal justice system based upon a set of legal, factual and policy decisions and considerations. Screening serves two primary goals of the prosecution function. The first is to eliminate cases where a prosecution would be fruitless and result in a considerable waste of limited resources due to a lack of sufficient admissible evidence to result in a conviction. The second is to comply with the obligation to insure that justice is served and that individuals who cannot be proven guilty with admissible evidence are not subjected to a criminal prosecution.

B. Objectives

As noted above, screening serves two of the primary objectives which must be present in any prosecutorial office. First, it aids in establishing meaningful priorities and in eliminating from further consideration those cases for which prosecution is inappropriate for reasons having to do with evidentiary sufficiency, evidentiary legality and resource scarcity among

others. Perhaps, most importantly, screening sets the professional tone of an office and determines its overall level of effectiveness. A second and equally important objective of screening is to insure that prosecution will not proceed against individuals who cannot be convicted and who in particular have been wrongly accused of a crime.

In order to achieve these dual objectives and insure that justice is achieved, that the resources of the criminal justice system are efficiently utilized and that the full resources of the Department of Law are effectively employed in the prioritization of cases and in the prosecution of individuals for whom guilt can be established beyond a reasonable doubt, it is essential that effective screening take place whenever possible prior to the initiation of charges, but in any event, as early in a case as possible. Once a decision has been made to prosecute, it is imperative that only appropriate and provable charge(s) be filed against a defendant. Lastly, it is equally important that once a decision to file charges has been made, charges that have been filed not be dismissed or reduced absent the development of new information or changed circumstances which justify a dismissal or a reduction. In other words, the initial charge should accurately reflect the level of proof available at the time the charge is filed. Overcharging is inappropriate either in terms of the number of counts charged or the magnitude of the charge and is not to be engaged in as a matter of prosecutorial "tactics."

because literal application of the law in all cases is neither possible nor desirable. Secondly, a prosecutor has legal and ethical obligations not only to prosecute violations of the law but also to protect the factually or legally innocent. Third, this balancing is necessary because a prosecutor must consider whether charging a person in a particular case will ultimately achieve one or more of the traditional purposes of criminal prosecution. Under the Alaska Constitution these purposes are identified as the reformation of the offender and protection of the public. The Alaska Supreme Court has further defined the purposes of criminal prosecution as follows: (1) rehabilitation of the offender into a noncriminal member of society; (2) protection of society from individuals who pose a danger; (3) deterrance of other individuals who might pose a similar danger in the future; and (5) reaffirmation of societal norms through community condemnation of the offender.

A prosecutor should balance these five considerations with his obligation to protect the factually and legally innocent in deciding whether to charge. Such decisions necessarily involve the exercise of discretion. However, it is possible to establish general guidelines to deal with basic charging problems. Relevant charging considerations can be identified and charging issues can be resolved in rather specific terms, eliminating inconsistency in result among similar cases.

D. Criminal Division Screening Policy

Charges shall be initiated only if at the time of filing, a case presented for prosecution contains, on its face,

sufficient legally admissible evidence to warrant a trier of fact to conclude that the defendant committed the offense charged beyond a reasonable doubt. If the original charge referred cannot be proven beyond a reasonable doubt, but there is another charge which can be proven, then the alternate charge will be the only charge filed. Prosecution will not be initiated unless in the professional judgment and experience of a reviewing prosecutor a case contains sufficient admissible evidence at the time of filing to result in a conviction absent a consideration of additional circumstances not reasonably available at the time a charging decision is made.

E. Charge Level

Once a decision to charge has been made, a determination must then be made as to the appropriate charge to file. Inherent in this determination is the responsibility to select the charge(s) which most accurately reflects conduct engaged in and offense(s) committed, which can be supported by sufficient admissible evidence to sustain a conviction and which provides for a sentence proportionate to the circumstances of the offense. The charging process is based upon the elements of a criminal act as defined by law when weighed against the evidence presented in a particular case.

When there is only one statute applicable to the accused's alleged conduct, the charging function is simple. Often, however, a single criminal event will give rise to potential criminal

liability for a number of different types or degrees of crime.

The following should be considered in selecting an appropriate charge:

(1) Nature of Criminal Conduct. A prosecutor's initial concern should be to select charges that adequately reflect the nature of the criminal conduct involved. The charges selected should be legally sufficient, should provide notice to the public of the seriousness of the conduct involved, and should negate any impression that after committing one offense an offender can commit others with impunity.

(2) Available Evidence. In selecting the proper charge, the prosecutor should file only those charges for which there exists admissible evidence sufficient to sustain a conviction at trial. He should not file charges which he cannot reasonably expect to be able to prove at trial.

(3) Overlapping Statutes. When confronted with a situation in which identical criminal conduct is punishable under two or more separate statutes providing significantly different penalties, the prosecutor should charge the offense with the greater penalty when any of the following situations exists:

a. The lesser offense does not adequately and fully describe the actual offense committed;

b. The penalties provided for the lesser charge are inadequate for the actual offense committed or for the accused because of his prior criminal record;

c. There is a specific evidentiary, legislative, judicial or prosecutorial function to be served by utilizing the charge with the greater penalty; or

d. There is an indication that the Legislature intended that the charge with the greater penalty be utilized in the type of situation under consideration.

F. Multiple Charges

(1) Joinder of Misdemeanors and Felonies. Misdemeanors should not be joined with felonies in Superior Court except when one of the following conditions exists:

(a) The evidence relating to the misdemeanor count is essential to proof of the evidence relating to the felony count;

(b) The conduct outlined in the misdemeanor count clearly demonstrates the aggravated nature of the felony count; or

(c) There is a reasonable possibility that a jury might not convict on the felony charge for reasons not based on the sufficiency of the evidence, although there is clearly sufficient evidence to support a conviction.

(2) Multiple Counts of Related Crimes. Alaska Criminal Rule 8(a) provides that two or more offenses may be charged in the same indictment or information if they "are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan." Applicable additional charges relating to a single course of conduct or scheme should be filed only if:

(a) Sufficient evidence exists to convict on each count;
(b) The circumstances of the case indicate that the appropriate level of charge is being filed as to degree or as to felony or misdemeanor; and

(c) Either

(1) The additional charge is not a mere technicality but portrays independent conduct committed by the accused which as a matter of sound prosecutorial policy would be charged if it were the only offense committed; or

(2) The additional charge is necessary as a matter of sound prosecutorial policy as an alternative theory of a case in order to insure that a case is not lost due to a technical insufficiency of proof at trial.

Under no circumstances are multiple charges to be filed as a matter of prosecutorial "tactics" designed solely to facilitate the disposition of a case through entry of a guilty plea.

(3) Multiple Counts of Unrelated Crimes. Although Alaska Criminal Rule 8(a) provides for the joinder of offenses on the same indictment or information if they "are of the same or similar character," the Alaska Supreme Court has disapproved such joinder. The court has indicated that unless the facts of one offense would be admissible at the trial of the other offense on, for example, the issue of identity due to similarity in "modus operandi", unrelated offenses, even of a similar nature, should not be joined. Thus, a series of rapes or armed robberies should not be joined on the same indict-

II. PLEA NEGOTIATIONS

A. Definition: As used in these guidelines, "plea negotiations" or "plea bargaining" refers to a process which involves discussions between the prosecution and the defendant or his attorney, if he is represented, that are designed to arrive at an agreement under which the defendant will waive his right to a trial and enter a plea of guilty to one or more charges in exchange for some concession from the prosecution usually in the form of a reduced charge, a reduced number of charges and/or a particular sentence recommendation or agreement not to oppose a defense recommendation at sentencing.

B. General Statement of Policy

Except withing the criteria set forth within these guidelines, it is the policy of the Department of Law that prosecuting attorneys for the State of Alaska will not engage in the practice of plea bargaining as defined above.

C. Sentence Negotiations

1. Policy: Unless specifically approved by the Attorney General or the Chief Prosecutor prior to the initiation of any negotiations, prosecuting attorneys will not enter into any agreement or understanding with a defendant or his attorney that is designed to lead to the entry of a plea of guilty in a criminal case that in any way involves a concession with respect to the State's position at the sentencing stage in a case.

(a) "Concession", as used herein, includes a commitment by the State: (1) to make a particular or general sentence recommendation; (2) to not oppose a particular or general sentence recommendation to be made by the defense; (3) to refrain from presenting to the court any information at sentencing; and (4) to refrain from taking a full and active adversarial role in the sentencing process as set forth in § II D, infra.

(b) "Criminal Cases", as used herein, include all offenses arising under laws of the State of Alaska except those classified as infractions and violations and those misdemeanor offenses that are exclusively administrative or regulatory in nature which do not involve or inherently connote criminality and which are referred to as "non-criminal cases" below.

2. Exceptions

(a) Criminal Cases: Sentence agreements in "criminal cases", as defined in § II C(1)(b), supra, may be entered into only with the prior approval of the Attorney General or the Chief Prosecutor on a case-by-case basis. Approval should be sought through a brief written memorandum addressed to the Chief Prosecutor through and with the concurrence of the supervising attorney of each office that sets forth the nature of the case, the specific nature of the sentence negotiation proposed and the reasons which support a deviation from the general policy. In general, approval will only be granted in those cases where: (1) it is necessary in order to protect

legitimate interests of a victim of the offense; (2) it is necessary and in the public interest to obtain the cooperation and testimony of a less culpable defendant in order to successfully prosecute a more culpable defendant; or (3) special circumstances are present in a case which necessitate a particular disposition in order to adequately protect the public from future criminal acts. Prior to requesting approval both the victim(s) and the law enforcement agency involved with a case should be contacted and their respective views concerning the proposed agreement should be set out in the request.

(b) Non-Criminal Cases: Sentence agreements may be entered into with the approval of the supervising attorney of each office in "non-criminal cases" as defined in § II C(1)(b), supra, but only consistent with a list of such offenses that has been previously approved by the Chief Prosecutor. Each office within the Criminal Division shall prepare and submit to the Chief Prosecutor for approval a list of all offenses to be designated as "non-criminal" for purposes of these guidelines. In addition to the specific offenses included, the list shall contain a proposed range of sentences within which a recommendation may be agreed to in a particular case. Included offenses within the category "non-criminal" will be consistent throughout the State, whereas the approved range of permissible sentence recommendations may be different from one location to another to take into consideration local economic circumstances in order to make sentence recommendations as uniform throughout the State as possible. Any amendments to

the list, including proposed amendments to the permissible range of sentence recommendations shall also be submitted for prior approval before implementation. Sentence agreements permitted under this subsection are restricted to an affirmative recommendation by the State and may not include any commitment: (1) to not oppose a particular or general sentence recommendation to be made by the defense; (2) to refrain from presenting to the court any information at sentencing; or (3) to refrain from taking a full and active role in the sentencing process.

D. Sentencing Proceedings

Other than under the exceptions set forth in this section, prosecuting attorneys will not make specific recommendations as to the sentence to be imposed. This does not mean that in any particular case a prosecuting attorney may remain silent at sentencing or indicate to the court that the State does not have a position with respect to sentence. To the contrary, in each case, both "criminal" and "non-criminal" as those terms are used in § II C(1)(b), supra, it is the responsibility of a prosecutor to make a full presentation at sentencing, bringing to the court's attention all factors present in a case that are in any way relevant to a consideration of sentence and fully characterizing the significance of these factors under the criteria set forth in State v. Chaney and AS 12.55.055 and 12.55.015(b) of the revised criminal code. There are no exceptions to this responsibility to make a full presentation at sentencing.

Under the following circumstances, a specific sentence recommendation will be permissible with the prior approval of the supervising attorney in a particular office:

- (1) when, with advance notice prior to sentencing, the sentencing court specifically requests the prosecuting attorney in the case to make a recommendation as to either a specific sentence or a specific form of sentence, but only on a case-by-case basis;
- (2) when there are unusual aggravating or mitigating circumstances present in a case which justify a specific sentence recommendation; or
- (3) when the court has imposed a sentence which provides for a period of probation and the specific recommendation is in respect to the conditions of probation to be imposed.

Any proposal to make a specific sentence recommendation other than as to a condition of probation must first be reviewed and approved by the supervising attorney for each office to determine: (a) whether in the particular case a specific sentence recommendation is warranted; and (b) whether the specific sentence proposed is consistent with sentences imposed in similar cases in that district and other districts throughout the State. In each case where a specific sentence recommendation is made, a brief memorandum is to be included in the case file indicating what the sentence recommendation was and why it was felt to be appropriate and necessary and indicating the prior approval required. Copies of these memoranda are to be forwarded to the Chief Prosecutor by each office monthly.

E. Charge Negotiations

1. Unless specifically approved by the Attorney General or the Chief Prosecutor prior to the initiation of any negotiations, prosecuting attorneys will not enter into any agreement or understanding with a defendant or his attorney that is designed to lead to the entry of a plea of guilty in a criminal case (as that term is defined in § II C(1)(b), supra) that in any way involves a concession with respect to the charge to be filed or which involves an agreement to dismiss or reduce a charge, except as provided under subsection (2) below. Requests for approval shall be submitted and will be considered in accordance with the procedures and criteria set out in § II C(2)(a) of these guidelines, supra.


2. In criminal cases involving multiple charges or counts which involve similar offenses, properly charged under § I F(2) of the guidelines, supra, and which do not include felony offenses involving violence against a person, one or more counts may be dismissed as a matter of office policy that may be communicated to the defendant before the entry of a plea provided that the following conditions are met:

- (a) the defendant pleads guilty to one or more counts included in the charging instrument which includes at least
 - the major charge, if any, and which represents a plea to the "essence" of the conduct engaged in and represented in the original charging document;

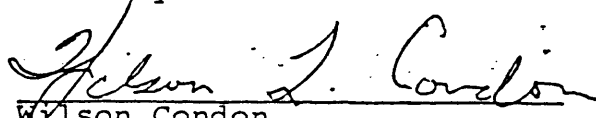
- (b) all information pertaining to the additional count or counts may be fully related to the court at sentencing; and
- (c) the dismissal of the remaining counts is specifically approved by the supervising attorney in each office.

3. Charge agreements may be entered into with the approval of the supervising attorney of each office in "non-criminal cases" as defined in § II C(1)(b), supra, for those offenses included on the list of offenses approved in accordance with § II C(2)(b), supra.

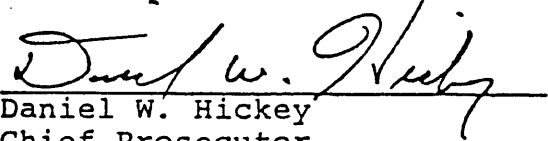
APPROVED:



Avrum M. Gross
Attorney General



Wilson Condon
Deputy Attorney General



Daniel W. Hickey
Chief Prosecutor

MEMORANDUM

State of Alaska

TO: All District Attorney Offices DATE: November 26, 1986

FILE NO.:

THRU:

TELEPHONE NO.:

SUBJECT: Modification of Standards

FROM: Harold M. Brown
Attorney General

The Criminal Division implemented the written Standards Applicable to Case Screening and Plea Negotiations on July 1, 1980. These standards set forth in detail the policy that had been pursued by the Division since 1975. The objective sought, that of creating and maintaining a highly professional system of prosecution that ensures a uniform method of charging and a balanced handling of case dispositions, is as important today as it was in 1975 or 1980 when the Standards were precisely set down in written form.

Several important developments have taken place since July 1, 1980. The Legislature enacted a system of presumptive sentencing that in the more serious cases, constricts the range of, or actually sets, the sentence. The Court of Appeals and the Supreme Court have made many important decisions on sentencing and we now have guidelines flowing from this body of case law on criminal sentencing. While these significant additions to the law were taking place, the overall experience of the legal staff of the Criminal Division was enhanced by a marked reduction in the turnover of attorney positions. At present more than half of Alaska's prosecutors have been with the Criminal Division since the adoption of the Standards.

The combination of the above factors creates a situation of sufficient change of circumstances to warrant a reexamination of the Standards. If the quality, uniformity and consistency that was intended at the time of drafting the Standards can be reached with an investment of fewer resources, we would be performing a disservice to the justice system and the state by not adjusting.

For these reasons, Part II-C. of the Standards is modified to allow each office, through the supervising attorney or the intake attorney if one is designated, to make specific sentencing recommendations or to agree to not oppose a recommendation. This authority may be exercised in cases involving non-presumptive sentences when, based on experience and professional judgment, the specific sentence being recommended would be reasonably foreseeable after a trial. This authority may also be exercised in cases involving presumptive sentences when, an analysis of cases involving similar facts, including

aggravating or mitigating factors and published or unpublished appellate decisions, provide specific guidance as to an appropriate sentence. Non-trial dispositions in unclassified and class A felony cases require the approval of the Central Office unless they are governed by an exception in the Standards that existed prior to this modification.

HMB:so-48

APPENDIX B

STATISTICAL METHODOLOGY

DATA COLLECTION FORM

RESEARCH STAFF

NUMBERS OF CASES IN DATABASE

J. Kruse
8/27/90

ALASKA PLEA BARGAINING/PRESUMPTIVE SENTENCING STUDY STUDY METHODS

Study Design

Administrative data from three agencies, prosecutor records, and interviews conducted with prosecutors, defense attorneys, judges, and prisoners form the basis for an examination of the persistence of plea bargaining and the influence of presumptive sentencing on the Alaska judicial system. Ideally the quantitative analysis component of this study could be solely based on machine readable administrative records for the entire period of interest: 1974 through the present. Administrative records were not available in machine readable form for the entire period, however. The quantitative analysis is therefore primarily based on data extracts pertaining to all felony cases handled by the state prosecutor's office between January 1, 1984 and December 31, 1987 and on hand coded information pertaining to all felony cases processed in Anchorage, Fairbanks, or Juneau between August 15, 1974 and August 14, 1976. The Judicial Council's first study of the ban on plea bargaining (Rubinstein, White, and Clarke, 1978) used the latter data set in a different form as its basis for quantitative analysis.

Questions about the reliability of some of the data as well as the complete absence of several variables of interest led to the addition of a sample component to the study. Prosecutor case records provided additional data as well as a check on the reliability of administrative data sets for a statewide stratified sample of cases. Finally, the study design included some 200 interviews with prosecutors, defense attorneys, judges, and prisoners. The purpose of these interviews was to better understand the intent and perceptions of the judicial community as a

means of establishing a context for analysis and as a means of explaining observed changes in case histories.

Data Sources

During the original study of the ban on plea bargaining, Judicial Council researchers coded charge and case data for all felony cases occurring in Anchorage, Fairbanks, and Juneau between August 15, 1974 and August 14, 1976. These data were later archived on magnetic tape and retrieved for use in the current study.

The primary source of quantitative data for this study is the Prosecutor's Management Information System, or PROMIS, maintained by the Alaska Department of Law. The Department and its statistical consultant, Wostmann & Associates, used Promis to generate three extracts containing data from the charge/disposition records, sentence records, case record, defendant record, and one event record (the sentence hearing).

The Alaska PROMIS database currently does not contain data on defendant characteristics such as race, sex, and presumptive sentencing status nor does it contain data on a defendant's prior criminal history. A key objective of the study, then, was to identify and match PROMIS case records with records in other administrative databases containing relevant information. One such database, APSIN, is maintained by the Alaska Department of Public Safety. APSIN contains data on the demographic characteristics and criminal history of individuals. A third database, OBSCIS, is maintained by the Alaska Department of Corrections and identifies individuals who were subject to presumptive sentencing at the time of their most recent conviction. OBSCIS also contains demographic and sentencing data.

Augmenting these administrative data sources for a sample of cases were prosecutor's case files. These files generally contain copies of court documents, the criminal intake and disposition

forms from which PROMIS records are constructed, criminal history reports from APSIN, report of the arresting officer, the notes of the intake prosecutor as well as the prosecutor ultimately handling the case, and a presentence report.

Universe Data Files Construction

The 1984-87 Universe Data File (84-87 UDF) consists of all cases with an originating felony charge received by the Department of Law between January 1, 1984 and December 31, 1987. Cases originating in the period from August 15, 1974 through August 14, 1976 are discussed later under the title of 1974-76 Universe Data File (74-76 UDF).

PROMIS is a relational database consisting of 19 different file types. The first step in constructing the 84-87 UDF was to extract the desired data from each file type and to construct single case records. A "case" is defined as one or more related charges as defined by the prosecutor in structuring the case. PROMIS software includes the capability of selecting a subset of cases and displaying information concerning these cases in a report. The software (GIP) was used to generate three extracts: (1) data from the charge disposition and sentence records; (2) data from the case and defendant records; and, (3) data from the event (sentence hearing) record. The three file extracts were sorted by case and saved to magnetic tape.

The 84-87 UDF raw data tape was read on the University of Alaska VAX 8800. computer system using the "C" programming language to construct single case records. Fields were reserved on each case record for seven charges. Each set of charge fields included data from the originating charge disposition record (OT) and from the prosecutor's charge disposition record (PR) sharing the same charge count with the OT record. It should be noted that the PROMIS database is not structured so that it is possible to be sure that OT and PR records identified with the same charge count in fact refer to the same charge. To allow for an examination of this

problem, PROMIS cases were segregated according to the number of originating and prosecutor charges. Of the 18,695 cases, 9,783 (52 percent) had an equal number of OT and PR records.

Given the way that the criminal intake and disposition form is designed, it is likely that OT and PR records associated with the same charge occur in the same sequence. Another 3,646 cases (19.5 percent) had only one OT and no PR record, each reflecting a case screened out. Some 2,876 cases (15.4 percent) had fewer OT records than PR records, reflecting an action initiated by the prosecutor. Most of these cases involved the addition of counts of the same type of offense (e.g. burglary, drugs, sexual abuse) and a mixture of charge dismissals and additions would be unlikely to change the basic character of the case. Finally, 2,317 cases (12.4 percent) had more OT records than PR records. It is these cases which are most likely to involve a mismatch of OT and PR records (e.g. charge one is dismissed and has no PR record and charge two's PR record is erroneously associated with charge one). An examination of a ten percent sample of these cases, however, showed few apparent mismatches. The few that did occur would have no net effect on screening, dismissal, or charge reduction rates given the way in which these variables were created.

The seven charge limit captured all charges for 98 percent of the cases. SPSSX Release 3.0 was used to read and subsequently process the 2,153 character length records. The PROMIS GIP extract yielded 18,695 cases, of which 4,615 cases were excluded for one of the following reasons: (1) solely involved probation revocation; (2) solely involved misdemeanor charges; (3) the case was received by the prosecutor's office after December 21, 1987; or, (4) the case was either not complete or was on appeal. Thus a total of 14,080 cases were selected for analysis and saved as an SPSSX system file.

The initial attempt to obtain Department of Public Safety APSIN data relied on the occurrence of an arrest date within the analysis period involving a felony offense in the APSIN

data base. Records pertaining to individuals meeting these criteria were saved to magnetic tape and transferred to the University computer system to be matched with the PROMIS data. The match process, described below, was only successful for 42 percent of the PROMIS cases. Upon further investigation, it appeared that the arrest data used in the initial APSIN screen was incomplete. A file extract of the 10,458 unmatched PROMIS cases was subsequently prepared and matched by the Department of Public Safety. They were successful in matching 96 percent of these cases for an overall match success of 98 percent of the PROMIS cases.

The Department of Corrections prepared a file extract of 53,213 cases containing individual identifiers for all persons ever booked in Alaska (i.e. spent at least some time in jail). Seventy-two percent of the PROMIS cases were successfully matched with OBSCIS records. Since not all defendants appearing in the PROMIS database are booked, it is not possible to establish a firm match standard. Based on conversations with Department of Corrections staff, however, well over 80 percent of the eligible PROMIS cases were matched with the OBSCIS database. Once matched, the PROMIS and OBSCIS case numbers were recorded on a diskette and used by the Department of Corrections to prepare a file extract containing defendant characteristics, presumptive status, and sentencing data. It should be noted that the OBSCIS system is designed to provide current rather than historical data for individuals. Since the same individual can be involved in two or more felony cases in the same analysis period, one cannot assume that the presumptive status and sentencing information in OBSCIS is accurate for a given felony case. A comparison of the year in which sentencing occurred in the PROMIS and OBSCIS databases shows a 69 percent agreement. Differences in coding of the sentence year probably account for some of the mismatches; therefore the match percentage is likely higher than 69 percent. Analyses run to test the strength of relationships for among key variables

showed no substantial gain in explanatory power by including only cases in which the PROMIS and OBSCIS sentence year matched. The full data set was therefore used.

PROMIS, APSIN, and OBSCIS do not contain required fields which can be used to match records across databases. PROMIS contains a single field for name; a notation field often used to record a driver's license number (partial data), social security number (partial data), or state identification number (partial data); and a date of birth field. APSIN contains separate fields for first, middle, and last names, date of birth, FBI number (partial data), and driver's license number (required field). OBSCIS contains single fields for name, date of birth, social security number (partial data), and FBI number (partial data) as well as an internal identifier, OBSCIS number. SPSSX was used to parse PROMIS and OBSCIS fields into match variables. Computer matches on multiple criteria (e.g. driver's license number, last name, year born) were used to identify and segregate matched PROMIS, OBSCIS, and APSIN records. Computer listings of records matched on less restrictive criteria were visually inspected before records were assumed to be correctly matched. A visual examination of unmatched records completed the match process.

Several data manipulations were necessary prior to analysis. First, most PROMIS fields contain alphanumeric characters that identify the units associated with a numeric measure. Thus, example, sentence length may be expressed in days (D), months (M), or years (Y). SPSSX was used to parse fields and to construct numeric measures in common units. Second, fields in the individual charge records were occasionally left blank when they should have contained data. SPSSX was again used to allocate values to empty fields where possible. Finally, charges recorded in PROMIS include a suffix giving information about the theory of the case. Charge codes were parsed to eliminate the theory suffix and subsequently used to identify the type of offense (e.g. drugs) and the seriousness of the offense (using Dept. of Law codes for offense class).

The incidence of charge reductions was indicated by a decline in the class value associated with a given charge. Thus charge reductions were calculated from the charge code rather than the disposition code. A reduction in any of up to seven charges at either the screening stage or during the prosecution of the case counted as a case charge reduction. Charge dismissals were identified in the OT and PR disposition fields for the seven charges tracked. The most serious arrest charge was identified for purposes of comparing types of cases or individual offenses. It was equated with the first charge associated with the highest class of offense among the seven or fewer charges recorded. The most serious convicted charge was also identified for case comparison purposes. It was either the first charge associated with the longest active sentence or the first convicted charge if no active sentence was received.

The 74-76 Universe Data File was created in a similar manner to the 84-87 Universe Data File. The original plea bargaining study used the individual charge as the principal unit of analysis. The data used in the study was archived as a raw data set with one logical record per charge. Each charge record, however, was identified with a defendant number. It was thus possible to construct case (or defendant) records. As in the other master file, up to seven charges were recorded per case. Comparable variable construction procedures were followed. The 74-76 UDF contains 2,283 records.

Sample Construction

Since the PROMIS, APSIN, and OBSCIS databases have been designed and used primarily for administrative purposes, there were concerns that some data elements might be unreliable. The only way to check on the reliability of the data was to check it against paper records in case files. Detailed data on the timing of charge reductions and dismissals is also not available in the PROMIS database. One of the objectives of the study was to assess the degree

to which the ban on plea bargaining has shifted the timing of charge reductions and dismissals forward in case processing. Again, the only way to meet this objective was to review paper records.

A review of case files maintained by the court system and the prosecutor's office suggested that the best single source would be the prosecutors' files. These files are archived and thus harder to retrieve once the case has been closed for three years. As a result, the sample was confined to the last two years of the analysis period, 1986 and 1987. The sample was designed to provide separate reports for the major court locations (Anchorage, Palmer, Fairbanks, Sitka, Juneau, Barrow, Nome, Kotzebue, and Bethel) while still yielding results representative of the state as a whole. The sample was also designed to optimize the reliability of charge reduction estimates by varying the probability of selection according to the observed rate of charge reduction by type of offense and location. Table B-1 displays the number of sample cases by location.

File Coding

SPSSX was used to write an ASCII file containing defendant, charge, and sentencing data for each sample case. The ASCII file was imported into Q & A, a database program. Q & A was used to create a coding form containing the PROMIS data to be verified and additional fields for data not contained in PROMIS, APSIN, or OBSCIS.

The Alaska Department of Law pulled the sample case files in each office. Coders were hired and trained using a coding manual and non-sample cases. Two project staff served as editors and consultants to the coders. A third project staff member conducted a final edit of each coding form and entered the data directly from the form to a new Q & A database file. Data from this file was subsequently exported in sequence to DBASE III, an ASCII file, and to

SPSSX. Selected data from the original PROMIS file and all data from the sample file were then matched by case and saved as an SPSSX system file.

Reliability of PROMIS Data

Comparisons of sample and PROMIS data show a high degree of agreement. There is 97 percent agreement in the most serious arrest charge, 85 percent agreement on the most serious convicted charge, 94 percent agreement on the final disposition code of the most serious convicted charge, 87 percent agreement on charge reduction, and a pearson correlation of .85 in active sentence length. Most of the analysis was therefore performed on the universe of cases.

Analysis Methods

Since most analyses are based on the universe of cases for a given time period rather than a sample, tests of significance are inappropriate. With the exception of Logit analyses performed to examine the decision whether or not to sentence an individual to active prison time, all univariate and multivariate analyses were performed within SPSSX. The Logit analyses were performed on ASCII file extracts generated in SPSSX using QUAIL 4.1 (Cambridge Systematics, Inc., Berkeley California).

<p align="center">TABLE B-1</p> <p align="center">1989 ALASKA PLEA BARGAINING STUDY</p> <p align="center">SAMPLE DESIGN</p>			
I. STRATIFICATION BY LOCATION	Percent of Total	Initial Sample Size	Final Sample Size
Self Representing:			
Anchorage	36	800	985
Fairbanks	16	400	381
Juneau	4	100	104
Bethel	6	100	104
Barrow	3	100	98
Nome/Kotzebue (50 each)	<u>7</u>	<u>100</u>	<u>105</u>
Subtotal	72	1,600	1,777
Representative Sample			
Remainder 3rd Judicial District	9	50	53
Kenai 143			
Kodiak 99			
Palmer 227		(50)	(53)
Valdez 24			
Remainder 1st Judicial District	19	60	60
Ketchikan 133			
Sitka 50		(60)	(56)
Petersburg 45			
	—	—	—
Subtotal	28	110	113
TOTAL	100	1,710	1,890

Source: Alaska Judicial Council/ISER

ALASKA JUDICIAL COUNCIL PLEA BARGAINING STUDY DATA COLLECTION FORM, Page 1

Case Number:

Prosecutor's Case Number:

Study Number:

Location:

Interviewer ID:

Defendant's Name, Last:

First:

Middle:

Suffix:

IDENTIFYING CHARACTERISTICS	
Date of Birth:	DK
Driver's License Number:	DK
Social Sec. Number:	DK
FBI Number:	DK
OBSCIS Number:	DK
Related case nos.	NA DK

DEMOGRAPHIC CHARACTERISTICS	
Sex:	
Race:	
Education:	
Income:	
Empl. status:	
Mar. status:	

CODING VALUES

Sex- Male	1	Race- White	1	Education- Less than HS	1
Female	2	Native	2	HS Diploma	2
Don't know	8	Black	3	Voc Ed	3
		Other	4	Some college	4
		Don't know	8	College degree	5
				Post college	6
				Don't know	8
Income- Under \$15,000	1			Employment Unemployed	1
\$15,000-35,000	2			Status- Sporadic jobs	2
Over \$35,000	3			Multiple jobs	3
Low Income	4	Marital Status-		Steady job	4
Moderate Income	5	Married	1	Student	5
High Income	6	Single	2	Homemaker	6
Don't know	8	Don't know	8	Don't know	8

START TIME-

END TIME-

ALASKA JUDICIAL COUNCIL PLEA BARGAINING STUDY DATA COLLECTION FORM, Page 2
Study Number:

OFFENSE CHARACTERISTICS				PRESENTENCE RECOMM.
Evid.of chronic subst.abuse?	1	2	8	Enter Code: 1 = short sentence 2 = moderate sentence 3 = long sentence 4 = time to serve 5 = time alrdy served 6 = probation 7 = prob. w/ rehab. 8 = don't know 0 = not applicable 9 = no recommendation Enter time in days if avail. (NA/DK):
Evid.of subst.abuse during off.?	1	2	8	
Was victim a relative?	1	2	8 0	
Notice of aggr. factors?	1	2	8 0	
Notice of mitig. factors?	1	2	8 0	
Number of prior felonies:	98			
Number of prior misdemeanors:	98			
No.prior offenses,unknown type:	98			

CASE CHARACTERISTICS			
Arrest Date: (YYMMDD)	DK	No. arrest charges:	98
1st App. Date:	DK NA	No. charges files:	98
Disp. Date:	DK	No. charges at final disposition:	98
Sentence Date:	DK NA	No convicted chgs:	98
Jail time before sent: (DAYS)	DK NA	RESTITUTION REQUIREMENT Enter code: 1. yes, under \$500 3. no 2. yes, \$500 plus 8. don't know 0. not appl.	
Judge:	DK NA		
Prosecutor:	DK		
Defense Att:	DK NA		

ALASKA JUDICIAL COUNCIL PLEA BARGAINING STUDY, DATA COLLECTION FORM, Page 3
Study Number:

CHARGE NUMBER	ARREST CHARGE	PROMIS CHARGE ACCEPTED FOR PROSECUTION	SCREEN- ING DISP.	REASON FOR CHANGE	FIRST APPEARANCE CHARGE	REASON FOR CHANGE
1						
2						
3						
4						
5						
6						
7						

CHARGE NUMBER	AMENDED CHARGE BEFORE INDICTMENT	REASON FOR CHANGE	WAS INDICTMENT WAIVED?	INDICTED CHARGE	REASON FOR CHANGE
1			1 2 8		
2			1 2 8		
3			1 2 8		
4			1 2 8		
5			1 2 8		
6			1 2 8		
7			1 2 8		

ALASKA JUDICIAL COUNCIL PLEA BARGAINING STUDY DATA COLLECTION FORM, Page 4
Study number:

CHARGE NUMBER	AMENDED CHARGE AFTER INDICTMENT	REASON FOR CHANGE	PROMIS FINAL CHARGE	REASON FOR CHANGE	WAS RULE 11 FILED?	FINAL DISPO- SITION
1					1 2 8	
2						
3						
4						
5						
6						
7						

CHARGE NUMBER	JAIL SENTENCE TOTAL TIME	SENTENCE TIME SUSPENDED	WAS IMPOS. SUSP.?	LENGTH OF PROBATION	TOTAL FINE	SUSPENDED FINE	PRESUM. SENT?
1	(days)	(days)	1 2 8	(days)	(\$) 99998	(\$) 99998	1 2 8
2							
3							
4							
5							
6							
7							

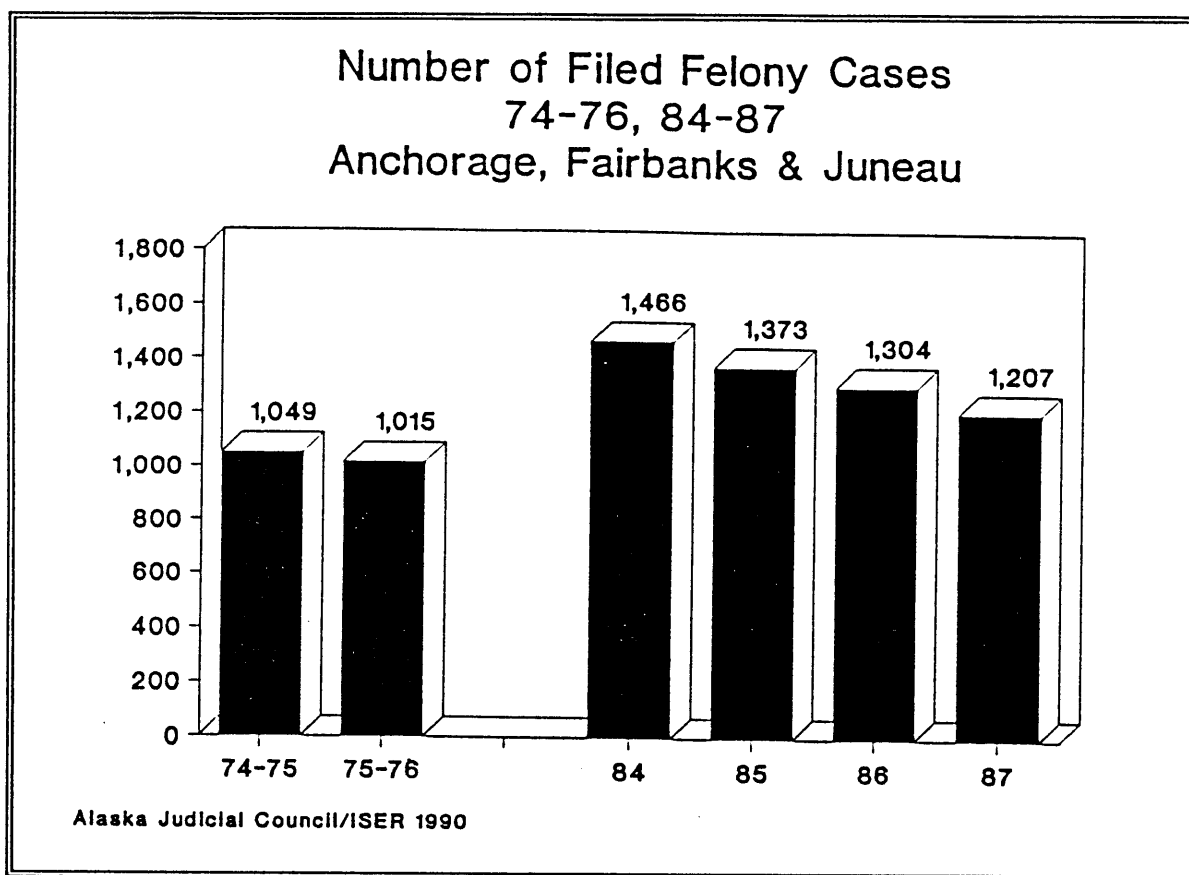


FIGURE B-1

- * Approximately 7% of felony cases filed in 1987 were open in late 1988 when these data were compiled, mostly because the defendants failed to appear at a scheduled hearing and had not been re-arrested. Others were not included because they did not meet the criteria established for inclusion in the study. For comparison, the Attorney General's office reported that a total of 2,200 cases were reviewed by prosecutors in Fiscal Year 1987 (July 1, 1986 - June 30, 1987).

TABLE B-2						
NUMBER OF ORIGINAL CASES REFLECTED IN DATA FILE*						
ANCHORAGE, FAIRBANKS, JUNEAU COMBINED AND STATEWIDE						
	8/15/74- 8/14/75	8/15/75- 8/14/76	1984	1985	1986	1987
ANCHORAGE, FAIRBANKS, JUNEAU						
All Offenses	1,143	1,140	2,095	1,905	1,834	1,703
Murder-Kidnapping	22	18	42	37	31	42
Violent Offenses	345	324	203	458	424	370
Assault II & III	233	201	303	289	253	244
Robbery	61	79	71	62	51	34
Property Offenses	488	504	852	772	742	710
Burglary I	69	59	166	149	122	136
Burglary II	64	97	168	170	114	126
Theft II	284	266	320	238	265	221
Criminal Mischief II	13	13	67	66	56	68
Forgery II	28	41	55	77	102	87
Sex Offenses	47	52	317	275	229	221
Sexual Assault I	21	24	114	68	53	63
Sex Abuse I	14	16	65	84	66	61
Sex Abuse Minor II	2	5	78	81	66	63
Drug Offenses	208	205	276	252	277	236
Drugs II & III	162	145	228	234	252	223
STATEWIDE						
All Offenses	*	*	3,788	3,634	3,417	3,241
Murder-Kidnapping			83	79	65	76
Violent Offenses	*	*	882	826	765	728
Assault II & III	*	*	577	578	494	505
Robbery	*	*	81	81	69	48
Property Offenses	*	*	1,472	1,432	1,342	1,239
Burglary I	*	*	280	278	276	258
Burglary II	*	*	302	323	236	240
Theft II	*	*	517	420	443	354
Criminal Mischief II	*	*	142	141	121	130
Forgery II	*	*	82	133	127	122
Sex Offenses	*	*	657	628	558	502
Sexual Assault I	*	*	238	169	141	129
Sex Abuse I	*	*	113	143	150	120
Sex Abuse Minor II	*	*	164	184	149	140
Drug Offenses	*	*	500	447	451	486
Drugs II & III	*	*	447	425	417	471

* For the years 1984-1987, this table includes slightly more cases than does Table 1 in the text. The few cases excluded from Table 1 did not have sufficiently complete data about their disposition to be included in that table, but were used elsewhere in the study so are shown here.

APPENDIX C

SENTENCING AND CHARGE TABLES

**TABLE C-1
CHARGE CHANGES, MOST FREQUENT CONVICTED OFFENSES***

Original Charge	N	Final Charge	N	% Convicted Original	% Convicted of Misd.
Murder I	91	Murder I	46	50.5	0.0
		Murder II	29		
		Manslaughter	8		
		Negligent Homicide	3		
		Assault I	1		
		Sexual Abuse I	1		
		Hinder Prosecution I	1		
		Attempted Assault I	1		
		Sexual Assault I	1		
Murder II	23	Murder II	7	30.4	8.7
		Manslaughter	10		
		Negligent Homicide	3		
		Tampering w/Phys. Evidence	1		
		Crim. Neg. Burning (misd.)	1		
		Assault IV (misd.)	1		
Manslaughter	51	Manslaughter	23	45.1	5.8
		Negligent Homicide	17		
		Assault I	1		
		Assault II	2		
		Assault III	1		
		Burglary I	1		
		Criminal Mischief II	1		
		Unlawful Possession	1		
		Fail to Render Aid	1		
		Assault IV (misd.)	2		
		DWI (misd.)	1		
Negligent Homicide	8	Negligent Homicide	3	37.5	25.0
		Manslaughter	2		
		Fail to Render Aid	1		
		Reckless Endanger. (misd.)	1		
		Reckless Driving (misd.)	1		
Assault I	150	Assault I	38	25.3	18.0
		Assault II	42		
		Assault III	37		
		Murder II	1		
		Manslaughter	1		
		Negligent Homicide	1		
		Burglary I	1		
		Attempted Murder I	1		
		Fail to Render Aid	1		
		Assault IV (misd.)	20		
		Reckless Endanger. (misd.)	2		
		Crim. Trespass I (misd.)	2		

* This table shows each of the more common single most serious arrest charges that resulted in a conviction for the defendant on any charge. The "final charge" is the single most serious charge left standing against the defendant at the time of conviction. Thus, a manslaughter charge may not actually have been reduced to "unlawful possession," but one defendant who was originally charged with manslaughter was convicted of unlawful possession.

TABLE C-1 (Continued)
CHARGE CHANGES, MOST FREQUENT CONVICTED OFFENSES

Original Charge	N	Final Charge	N	% Convicted Original	% Convicted of Misd.
Assault I (Cont'd)		DWI (misd.) Reckless Driving (misd.) Rules of the Road (misd.)	1 1 1		
Assault II	237	Assault II Assault I Negligent Homicide Assault III Robbery II Theft II Criminal Mischief II Terrorist Threat Leave Scene Injury Accident Fail to Render Aid Assault IV (misd.) Reckless Endanger. (misd.) Theft IV (misd.) Crim. Mischief III (misd.) Resist/Inter w/Arr (misd.) Make False Report (misd.) Disorderly Conduct (misd.) Harassment (misd.) Misc. Inv. Weapon II (misd.) Att. Assault III (misd.) DWLS (misd.) DWI (misd.) Reckless Driving (misd.)	38 9 1 50 1 1 1 1 1 1 2 110 4 1 2 2 1 1 1 1 1 1 5 2	16.0	55.7
Assault III	824	Assault III Assault I Assault II Crim. Mischief II Escape I Tamp. w/Witness I Misc. Inv. Weapon II Leave Scene Injury Acc. Fail to Render Aid Attempted Assault II Assault IV (misd.) Reckless Endanger. (misd.) Theft III (misd.) Crim. Trespass (misd.) Crim. Mischief III (misd.) Crim. Mischief IV (misd.) Escape IV (misd.) Resis/Inter w/Arr (misd.) Disorderly Conduct (misd.) Harassment (misd.) Misc. Inv. Weapon II (misd.) Misc. Inv. Weapon III (misd.) Minor Cons/Poss (misd.) Contempt of Court (misd.)	238 1 1 2 1 1 1 2 2 1 340 52 1 4 12 2 1 9 15 2 65 11 1 1	28.9	69.7

TABLE C-1 (Continued)
CHARGE CHANGES, MOST FREQUENT CONVICTED OFFENSES

Original Charge	N	Final Charge	N	% Convicted Original	% Convicted of Misd.
Assault III (Cont'd)		Driver Must Be Licensed (misd.)	2		
		DWLS (misd.)	6		
		DWI (misd.)	37		
		Reckless Driving (misd.)	10		
		Fail Immed. Rpt. Acc. (misd.)	1		
		Disobey Peace Officer (misd.)	1		
		Attempted Theft II (misd.)	1		
Kidnapping	84	Kidnapping	12	14.3	21.4
		Negligent Homicide	1		
		Assault II	2		
		Assault III	10		
		Sexual Assault I	17		
		Sexual Assault II	4		
		Sexual Abuse II	1		
		Robbery I	8		
		Robbery II	2		
		Burglary I	2		
		Hinder Prosecution I	1		
		Misc. Inv. Weapon I	1		
		Attempted Kidnapping	1		
		Attempted Sexual Assault I	1		
		Attempted Sexual Assault II	2		
		Attempted Sexual Abuse II	1		
		Assault IV (misd.)	15		
		Reckless Endanger. (misd.)	2		
		Harassment (misd.)	1		
Sexual Assault I	227	Sexual Assault I	98	43.2	6.6
		Sexual Assault II	32		
		Sexual Assault III	1		
		Sexual Abuse I	8		
		Sexual Abuse II	18		
		Sexual Abuse Minor III	3		
		Assault I	2		
		Assault II	3		
		Assault III	7		
		Sexual Abuse before 10/17/83	5		
		Incest	4		
		Robbery II	1		
		Burglary I	4		
		Drugs (4th)	1		
		Attempted Sexual Assault I	12		
		Attempted Sexual Assault II	8		
		Attempted Sexual Abuse I	3		
		Attempted Sexual Abuse II	2		
		Assault IV (misd.)	7		
		Crim. Trespass I (misd.)	2		

TABLE C-1 (Continued)
CHARGE CHANGES, MOST FREQUENT CONVICTED OFFENSES

Original Charge	N	Final Charge	N	% Convicted Original	% Convicted of Misd.
Sexual Assault I (Cont'd)		Harassment (misd.) Minor Cons/Poss (misd.) Att. Sexual Abuse Minor III (misd.)	3 2 1		
Sexual Assault II	64	Sexual Assault II Sexual Abuse II Sexual Abuse Minor III Incest Burglary I Assault III Attempted Sexual Assault I Attempted Sexual Assault II Indecent Exposure (misd.) Crim. Trespass I (misd.) Harassment (misd.) Assault IV (misd.) Minor Cons/Poss (misd.) Attempted Sexual Assault III (misd.) Attempted Incest (misd.)	15 3 4 1 1 1 1 11 2 5 8 9 1 1 1	23.4	42.2
Sexual Abuse I	248	Sexual Abuse I Sexual Abuse II Sexual Abuse Minor III Sexual Assault I Sexual Abuse before 10/17/89 Attempted Sexual Assault II Attempted Sexual Abuse I Attempted Sexual Abuse II Incest Assault IV (misd.) Contr. Del. Minor (misd.)	104 89 5 8 8 1 23 4 2 1 3	41.9	1.6
Sexual Abuse II	240	Sexual Abuse II Sexual Abuse Minor III Sexual Abuse I Sexual Assault I Sexual Assault II Sexual Assault III Sexual Abuse before 10/17/83 Burglary I Attempted Sexual Abuse I Attempted Sexual Abuse II Assault IV (misd.) Indecent Exposure (misd.) Crim. Trespass I (misd.) Contr. Del. Minor (misd.) Harassment (misd.)	152 16 2 1 1 1 16 3 2 25 4 2 1 5 7	63.3	8.8

TABLE C-1 (Continued)
CHARGE CHANGES, MOST FREQUENT CONVICTED OFFENSES

Original Charge	N	Final Charge	N	% Convicted Original	% Convicted of Misd.
Sexual Abuse II (Cont'd)		Att. Sexual Assault III (misd.) Att. Sexual Abuse Minor (misd.)	1 1		
Robbery I	181	Robbery I Robbery II Theft II Assault II Assault III Sexual Abuse I Burglary I Crim. Mischief II Hinder Prosecution I Misc. Inv. Weapon I Theft III (misd.) Conceal Merchandise (misd.) Theft IV (misd.) Assault IV (misd.) Crim. Mischief III (misd.) Forgery III (misd.) Resis/Inter w/Arr (misd.) Attempted Theft II (misd.)	110 28 3 5 9 1 5 1 1 1 1 5 1 1 4 2 1 2 1	60.8	9.4
Robbery II	70	Robbery II Robbery I Assault III Theft II Tamp. w. Phys. Evid. Failure to Appear Assault IV (misd.) Theft III (misd.) Theft IV (misd.) Crim. Trespass I (misd.) Disorderly Conduct (misd.) Attempted Theft II (misd.) Attempted Theft III (misd.)	21 2 2 12 1 1 16 9 1 1 1 1 1 2	30.0	44.3
Theft I	57	Theft I Theft II Bad Checks burglary II Crim. Mischief II Crim. Mischief III Scheme to Defraud Misapplication Property Attempted Theft I Theft III (misd.) Forgery III (misd.) Unsworn Falsification (misd.)	29 11 1 6 1 1 2 1 1 2 1 1	50.9	7.0

TABLE C-1 (Continued)
CHARGE CHANGES, MOST FREQUENT CONVICTED OFFENSES

Original Charge	N	Final Charge	N	% Convicted Original	% Convicted of Misd.
Theft II	592	Theft II	329	55.6	38.0
		Theft I	1		
		Removal of ID Marks	1		
		Bad Checks	2		
		Fraud-Use Credit Card	5		
		Burglary I	1		
		Burglary II	5		
		Crim. Mischief II	3		
		Forgery I	1		
		Forgery II	8		
		Scheme to Defraud	1		
		Misc. Inv. Weapon I	4		
		Misc. Inv. Weapon II	3		
		Failure to Appear	1		
		Felony Title/Reg.	1		
		Drugs (4th)	2		
		Theft III (misd.)	162		
		Theft IV (misd.)	6		
		Assault IV (misd.)	1		
		Conceal Merchandise (misd.)	1		
		Crim. Trespass ((misd.)	2		
		Crim. Trespass II (misd.)	6		
		Crim. Mischief III (misd.)	23		
		Forgery III (misd.)	1		
		Contr. Delinq. Minor	1		
		Unsworn Falsification (misd.)	2		
		Make False Report (misd.)	1		
		Misc. Inv. Weapon III (misd.)	3		
		Minor Cons/Poss (misd.)	1		
		DWLS (misd.)	3		
		DWI (misd.)	3		
		Reckless Driving (misd.)	1		
		Disobey Peace Officer (misd.)	1		
		Attempted Theft II (misd.)	3		
		Attempted Theft III (misd.)	2		
		Attempted Forgery II (misd.)	1		
Burglary I	597	Burglary I	268	44.9	33.8
		Burglary II	51		
		Assault III	8		
		Sexual Abuse II	2		
		Theft I	3		
		Theft II	45		
		Crim. Mischief I	1		
		Crim. Mischief II	5		
		Forgery II	1		
		Escape III	1		
		Hinder Prosecution I	1		
		Misc. Inv. Weapon I	1		

TABLE C-1 (Continued)
CHARGE CHANGES, MOST FREQUENT CONVICTED OFFENSES

Original Charge	N	Final Charge	N	% Convicted Original	% Convicted of Misd.
Burglary I (Cont'd)		Drugs (4th)	1		
		Failure to Appear	1		
		Attempted Murder I	1		
		Attempted Sexual Assault II	1		
		Attempted Burglary I	1		
		Crim. Trespass I (misd.)	108		
		Crim. Trespass II (misd.)	12		
		Assault IV (misd.)	25		
		Theft III (misd.)	26		
		Theft IV (misd.)	7		
		Crim. Mischief III (misd.)	14		
		Resist/Inter w/Arr (misd.)	1		
		Disorderly Conduct (misd.)	3		
		Harassment (misd.)	1		
		Minor Cons/Poss (misd.)	1		
		DWLS (misd.)	2		
		Attempted Theft II (misd.)	1		
		Attempted Burglary II (misd.)	1		
Burglary II	598	Burglary II	369	61.7	29.9
		Burglary I	15		
		Fraud-Use Credit Card	1		
		Crim. Mischief II	9		
		Forgery I	1		
		Misc. Inv. Weapon I	1		
		Coercion	1		
		Theft II	22		
		Crim. Trespass I (misd.)	26		
		Crim. Trespass II (misd.)	68		
		Crim. Mischief III (misd.)	23		
		Crim. Mischief IV (misd.)	4		
		Contr. Delinq. Minor (misd.)	1		
		DWLS (misd.)	1		
		DWI (misd.)	1		
		Theft III (misd.)	26		
		Theft IV (misd.)	6		
		Attempted Assault IV (misd.)	1		
		Attempted Theft II (misd.)	1		
		Attempted Theft III (misd.)	1		
		Attempted Theft IV (misd.)	1		
		Attempted Burglary II (misd.)	18		
		Att. Crim. Trespass (misd.)	1		
Crim. Mischief II	240	Crim. Mischief II	80	33.3	64.2
		Misc. Inv. Weapon I	1		
		Misc. Inv. Weapon II	1		
		Assault III	1		
		Burglary II	1		
		Leave Scene Injury Acc.	2		
		Crim. Mischief III (misd.)	99		

TABLE C-1 (Continued)
CHARGE CHANGES, MOST FREQUENT CONVICTED OFFENSES

Original Charge	N	Final Charge	N	% Convicted Original	% Convicted of Misd.
Crim. Mischief II (Cont'd)		Crim. Mischief IV (misd.)	5		
		Resis/Inter w/Arr (misd.)	4		
		Disorderly Conduct (misd.)	3		
		Assault IV (misd.)	7		
		Reckless Endanger. (misd.)	2		
		Crim. Trespass I (misd.)	1		
		Crim. Trespass II (misd.)	1		
		Rules of the Road (misd.)	1		
		Driver Must Be Licensed (misd.)	3		
		DWLS (misd.)	3		
		DWI (misd.)	19		
		Reckless Driving (misd.)	5		
		Disobey Peace Officer (misd.)	1		
Forgery I	20	Forgery I	10	50.0	15.0
		Forgery II	6		
		Scheme to Defraud	1		
		Forgery III (misd.)	2		
		Resis/Inter w/Arr (misd.)	1		
Forgery II	213	Forgery II	175	82.2	12.2
		Scheme to Defraud	5		
		Theft II	3		
		Bad Checks	2		
		Fraud-Use Credit Card	2		
		Forgery III (misd.)	19		
		Crim. Impersonation (misd.)	1		
		DWLS (misd.)	1		
		Theft III (misd.)	3		
		Attempted Forgery II (misd.)	2		
Misc. Inv. Weapon I	89	Misc. Inv. Weapon I	61	68.5	25.8
		Crim. Poss Explosives	2		
		Drugs (4th)	1		
		Theft II	1		
		Burglary I	1		
		Misc. Inv. Weapon II (misd.)	5		
		Misc. Inv. Weapon III (misd.)	10		
		Driver Must Be Licensed (misd.)	1		
		DWI (misd.)	3		
		Assault IV (misd.)	2		
		Reckless Endanger. (misd.)	2		
Drugs (1st degree)	16	Drugs (1st degree)	3	18.8	12.5
		Drugs (3rd degree)	7		
		Drugs (4th degree)	2		
		Sexual Abuse II	1		

TABLE C-1 (Continued)
CHARGE CHANGES, MOST FREQUENT CONVICTED OFFENSES

Original Charge	N	Final Charge	N	% Convicted Original	% Convicted of Misd.
Drugs (1st degree) (Cont'd)		Sexual Abuse Minor III Drugs (5th degree) (misd.) Att. Drugs (4th) (misd.)	1 1 1		
Drugs (2nd degree)	36	Drugs (2nd degree) Drugs (3rd degree) Drugs (4th degree) Assault IV (misd.)	28 3 4 1	77.8	2.8
Drugs (3rd degree)	534	Drugs (3rd degree) Drugs (4th degree) Deliv. Fake Drugs Fail to Render Aid Sexual Abuse II Forgery III tamp. w/Phys. Evid. Hinder Prosecution I Attempted Narcotics Attempted Drugs (3rd degree) Drugs (5th degree) (misd.) Drugs (6th degree) (misd.) Drugs (7th degree) (misd.) Furn. Liq./Minor (misd.) Assault IV (misd.) Theft III (misd.) Crim. Trespass II (misd.) Contr. Delinq. Minor (misd.) Disorderly Conduct (misd.) Att. Drugs (4th) (misd.)	411 73 3 1 1 1 1 1 1 1 24 3 1 1 1 1 1 3 1 4	77.0	7.5
Drugs (4th degree)	311	Drugs (4th degree) Drugs (3rd degree) Deliv. Fake Drugs Theft II Prom. Contraband I Liq. w/o License Drugs (5th) (misd.) Drugs (6th) (misd.) Drugs (7th) (misd.) Assault IV (misd.) Theft IV (misd.) Crim. Trespass II (misd.) Forgery III (misd.) Make False Report (misd.) Disorderly Conduct (misd.) Misc. Inv. Weapon II (misd.) Misc. Inv. Weapon III (misd.) Allow Drunk Premises (misd.) Bottle Club (misd.) Driver M/B Licensed (misd.)	187 4 1 1 1 1 32 9 2 1 1 2 2 1 2 1 4 1 1 1	60.1	37.3

TABLE C-1 (Continued)
CHARGE CHANGES, MOST FREQUENT CONVICTED OFFENSES

Original Charge	N	Final Charge	N	% Convicted Original	% Convicted of Misd.
Drugs (4th degree) (Cont'd)		DWLS (misd.)	4		
		DWI (misd.)	20		
		Reckless Driving (misd.)	2		
		Attempted Theft IV (misd.)	1		
		Att. Drugs (4th) (misd.)	27		
		Att. Drugs (5th) (misd.)	2		
Perjury	20	Perjury	18	90.0	0.0
		Forgery II	1		
		Theft II	1		
Prom. Contraband I	58	Prom. Contraband I	40	69.0	31.0
		Prom. Contraband II (misd.)	10		
		Misc. Inv. Weapon III (misd.)	1		
		Drugs (4th) (misd.)	2		
		Att. Prom. Contraband I (misd.)	5		

TABLE C-2 MURDER AND KIDNAPPING											
Offense	Number of Offenders	Mean Active Sentence X	N	SD	Probation %	N	1 day - 12 months	13-24 months	25-60 months	61-96 months	Over 96 months
Murder I	47	748.5	46	362.2	2.1	1	---	---	---	---	46
Murder II	37	332.4	37	233.0	---	---	---	---	2	3	32
Kidnapping	13	145.4	12	138.2	7.7	1	---	1	4	---	7
Attempted Murder I	11	140.4	11	76.9	---	---	---	---	1	4	6

TABLE C-3 VIOLENT OFFENSES									
Offense	Number of Offenders	Mean Active Sentence X	SD	Probation % N	1 day - 12 months	13-24 months	25-60 months	61-96 months	Over 96 months
<u>Class A</u>									
Attempted Kidnap	1	30.0	---	---	---	---	1	---	---
S. Murder I	2	129.0	72.2	---	---	---	---	1	1
Manslaughter	45	60.6	30.8	8.9	2	2	31	2	4
Assault I	60	78.5	47.3	10.0	3	4	17	19	11
Robbery I	122	85.7	91.1	4.1	1	4	51	34	27
Arson I	11	84.0	50.1	9.1	---	---	6	---	4
<u>Class B</u>									
Assault II	100	24.6	21.9	12.0	43	13	27	4	1
Robbery II	53	26.6	22.7	13.2	16	11	17	1	1
Extortion	3	39.0	29.7	33.3	---	1	1	---	---
Att. Assault I	2	72.0	17.0	---	---	---	---	1	1
Att. Robbery I	1	48.0	---	---	---	---	1	---	---
S. Robbery I	1	36.0	---	---	---	---	1	---	---
<u>Class C</u>									
Assault III	383	16.2	12.5	22.7	166	89	41	---	---
Neg. Homicide	29	16.0	12.3	17.2	10	12	2	---	---
Terr. Threat	7	30.6	20.6	28.6	1	1	3	---	---
Cust. Interference I	3	15.0	12.7	33.3	1	1	---	---	---
Att. Assault II	1	---	---	100.0	---	---	---	---	---
Att. Extortion	2	3.5	2.1	---	2	---	---	---	---
Coercion	2	12.0	---	50.0	1	---	---	---	---
<u>Misdemeanor</u>									
Assault IV	587	3.6	4.8	45.1	322	---	---	---	---
Reckless Endanger.	67	5.0	4.1	55.2	30	---	---	---	---
Cust. Interference II	1	---	---	100.0	---	---	---	---	---
Att. Assault III	1	---	---	100.0	---	---	---	---	---
Att. Assault IV	2	---	---	100.0	---	---	---	---	---
Att. Coercion	1	6.0	---	---	1	---	---	---	---
Att. Terror Threat	2	1.0	0.0	---	2	---	---	---	---

TABLE C-4
PROPERTY OFFENSES

Offense	Number of Offenders	Mean Active Sentence X N	SD	Probation % N	1 day - 12 months	13-24 months	25-60 months	61-96 months	Over 96 months
<u>Class B</u>									
Att. Arson I	1	19.0	0.0	--	--	1	--	--	--
Theft I	34	25.2	20.3	8.8	11	10	9	1	--
Burglary I	309	27.6	24.4	27.8	91	44	64	21	3
Arson II	16	30.0	26.6	25.0	6	1	3	2	--
Crim. Mischief I	2	48.0	--	50.0	--	--	1	--	--
Forgery I	11	41.0	32.6	63.6	1	1	1	1	--
Scheme to Defraud	14	31.7	19.5	--	3	4	6	1	--
<u>Class C</u>									
Theft II	432	15.3	11.7	42.4	135	81	33	--	--
Burglary II	438	18.2	13.9	32.2	141	95	61	--	--
Crim. Mischief II	111	16.9	15.6	36.0	40	18	13	--	--
Forgery II	195	20.8	13.9	37.9	47	41	33	--	--
Bad Checks	37	14.2	14.0	54.1	10	5	2	--	--
Att. Theft I	1	53.0	--	--	--	--	1	--	--
Att. Burglary I	8	9.7	12.4	62.5	2	1	--	--	--
S. Arson II	1	--	--	100.0	--	--	--	--	--
<u>C Felony/A Misdemeanor*</u>									
Crim. Mischief III	199	5.3	6.7	49.7	92	7	1	--	--
Crim. Neg. Burning	15	12.4	23.5	60.0	5	--	1	--	--
Conceal Merchandise	4	18.5	24.8	50.0	1	--	1	--	--
Unlawful Possession	1	18.0	--	--	--	1	--	--	--
Fraud-Use Credit Card	22	17.1	16.4	50.0	6	4	1	--	--
<u>Misdemeanors</u>									
Theft III	239	3.5	3.1	55.2	107	--	--	--	--
Trespass I	155	3.4	3.1	52.9	73	--	--	--	--
Forgery III	26	5.1	6.3	53.8	12	--	--	--	--
Theft IV	25	6.3	13.8	52.0	12	--	--	--	--
Trespass II	91	2.7	4.3	63.7	33	--	--	--	--
Crim. Mischief IV	12	1.7	0.5	50.0	6	--	--	--	--

* These offenses may be either a felony or a misdemeanor depending upon the facts of the individual case. Our data did not have sufficient detail to allow us to distinguish between felonies and misdemeanors.

TABLE C-4 PROPERTY OFFENSES (Continued)									
Offense	Number of Offenders	Mean Active Sentence X	SD	Probation %	1 day - 12 months	13-24 months	25-60 months	61-96 months	Over 96 months
<u>Misdemeanors (Cont'd)</u>									
Removal of ID Marks	3	11.0	---	66.7	2	1	---	---	---
Crim. Impersonation	1	3.0	---	---	---	1	---	---	---
Misapplication Property	1	12.0	---	---	---	1	---	---	---
Att. Theft II	8	4.4	4.3	37.5	3	5	---	---	---
Att. Theft III	5	1.5	0.7	60.0	3	2	---	---	---
Att. Theft IV	2	2.0	0.0	---	---	2	---	---	---
Att. Burglary II	19	4.7	6.6	42.1	8	11	---	---	---
Att. Crim. Trespass I	3	1.0	1.0	66.7	2	1	---	---	---
Att. Forgery II	3	1.0	0.0	33.3	1	2	---	---	---
Att. False Bus. Rec.	1	---	---	100.0	1	---	---	---	---

TABLE C-5 SEXUAL OFFENSES										
Offense	Number of Offenders	Mean Active Sentence X	N	SD	Probation % N	1 day - 12 months	13-24 months	25-60 months	61-96 months	Over 96 months
<u>Unclassified</u> Sexual Assault I Sexual Abuse I	127 116	107.7 93.2	118 113	69.3 49.5	7.1 9 2.6 3	3 3	6 5	20 17	54 75	35 13
<u>Class A</u> Att. Sexual Assault I Att. Sexual Abuse I A41.434A (Incest)	21 12 19	65.4 74.2 69.8	20 12 19	36.7 56.8 32.0	4.8 1 --- --- --- ---	2 2 2 --- --- ---	--- --- --- --- --- ---	12 7 7 16	2 1 1 1	4 2 2 2
<u>Class B</u> Sexual Assault II Sexual Abuse II	60 276	31.4 29.5	57 235	18.9 21.9	5.0 3 14.9 41	11 67	19 58	23 97	4 9	--- 4
<u>Class C</u> Sexual Assault III Sexual Abuse/Minor III Incest Att. Sex. Assault II Att. Sex. Abuse II Solicit. Expl./Minor	4 51 10 26 37 1	7.0 14.1 25.0 16.7 20.4 48.0	3 39 10 24 29 1	4.6 15.4 14.2 11.8 18.1 0.0	25.0 1 23.5 12 --- --- 7.7 2 21.6 8 --- ---	3 3 25 1 1 12 17 17 --- ---	--- 9 9 7 7 7 4 4 --- ---	--- 5 5 2 5 5 8 8 1 1	--- --- --- --- --- --- --- --- --- ---	--- --- --- --- --- --- --- --- --- ---
<u>C Felony/A Misdemeanor*</u> Abuse before 10/17/83 or Sex. Abuse IV	49	29.4	42	23.0	14.3 7	13	14	15	---	---
<u>Misdemeanors</u> Indecent Exposure Att. Sexual Assault III Att. Sex. Abuse/Minor III Att. Sex. Abuse/Minor IV Att. Incest	5 2 7 1 1	20.4 --- 7.0 30.0 ---	3 --- 2 1 ---	28.4 --- 7.1 --- ---	40.0 2 100.0 2 71.4 5 --- --- 100.0 1	2 --- 2 2 --- --- --- ---	--- --- --- --- --- --- --- ---	1 --- --- --- --- --- --- ---	--- --- --- --- --- 1 --- ---	--- --- --- --- --- --- --- --- --- ---

* These offenses may be either a felony or a misdemeanor depending upon the facts of the individual case. Our data did not have sufficient detail to allow us to distinguish between felonies and misdemeanors.

TABLE C-5 DRUG OFFENSES										
Offense	Number of Offenders	Mean Active Sentence X	N	SD	Probation % N	1 day - 12 months	13-24 months	25-60 months	61-96 months	Over 96 months
<u>Unclassified</u> Drugs (1st Degree)	3	137.5	2	143.5	33.3 1	---	---	1	---	1
<u>Class A</u> Drugs (2nd Degree)	28	60.7	27	31.7	3.6 1	---	1	20	4	2
<u>Class B</u> Drugs (3rd Degree)	425	20.1	296	16.8	29.9 129	136	71	85	4	---
<u>Class C</u> Drugs (4th Degree)	273	13.3	139	14.5	48.4 134	93	25	21	---	---
Att. Drugs (3rd)	2	12.0	2	---	---	2	---	---	---	---
<u>Misdemeanors</u> Att. Drugs (4th)	32	3.1	21	3.1	34.4 11	21	---	---	---	---
Drugs (5th Degree)	57	2.4	31	1.9	45.6 26	31	---	---	---	---
Att. Drugs (5th)	2	---	---	---	100.0 2	---	---	---	---	---
Drugs (6th Degree)	12	2.0	2	1.4	66.7 10	2	---	---	---	---
Drugs (7th Degree)	5	---	---	---	20.0 5	---	---	---	---	---

TABLE C-7
OTHER OFFENSES

Offense	Number of Offenders	Mean Active Sentence X	N	SD	Probation %	N	1 day - 12 months	13-24 months	25-60 months	61-96 months	Over 96 months
<u>Class A</u> Escape I	1	60.0	1	--	--	--	--	--	1	--	--
<u>Class B</u> Perjury	18	25.1	15	25.0	16.7	3	7	2	5	1	--
Escape II	22	37.8	21	25.5	4.5	1	5	3	9	4	--
Inter. w/Offic. Proceed.	7	60.0	2	17.0	71.4	5	--	--	1	1	--
Del. Fake Drugs/Minor	1	6.0	1	--	--	--	1	--	--	--	--
<u>Class C</u> Escape III	8	30.0	4	7.9	50.0	4	--	2	2	--	--
Prom. Contraband I	42	12.4	30	10.2	28.6	12	22	5	3	--	--
Tamp. w/Witness I	3	7.5	2	2.1	33.3	1	2	--	--	--	--
Tamp. w/Phys. Evid.	5	60.0	1	--	80.0	4	--	--	1	--	--
Hinder Prosec. I	8	23.3	4	22.2	50.0	4	2	--	2	--	--
Misc. Inv. Weapon I	71	24.5	52	14.0	26.8	19	13	22	17	--	--
Del. Fake Drugs	4	37.5	4	15.8	--	--	--	1	3	--	--
Felony Title Reg.	2	--	--	--	100.0	2	--	--	--	--	--
Leave Scene Injury Acc.	10	22.2	9	25.6	10.0	1	5	1	3	--	--
Att. Cocaine	1	24.0	1	--	--	--	1	--	--	--	--
Att. Escape II	3	20.0	3	13.9	--	--	2	--	1	--	--
<u>Misdemeanors</u> Crim. Nonsupport	1	--	--	--	100.0	1	--	--	--	--	--
Contr. Delinq. Minor	13	4.1	10	3.5	23.1	3	10	--	--	--	--
Unsworn Falsification	3	--	--	--	100.0	3	--	--	--	--	--
Escape IV	5	1.5	4	1.0	20.0	1	4	--	--	--	--
Unlawful Evasion	7	5.4	3	5.9	47.1	4	3	--	--	--	--
Prom. Contraband II	10	2.6	7	1.9	30.0	3	7	--	--	--	--
Resis/Inter w/Arr	23	2.6	17	1.8	26.1	6	17	--	--	--	--
Hinder Prosec. II	2	--	--	--	100.0	2	--	--	--	--	--
Make False Report	6	1.0	1	--	83.3	5	1	--	--	--	--
Impers. Public Servant	1	2.0	1	--	--	--	1	--	--	--	--

TABLE C-7 OTHER OFFENSES (Continued)										
Offense	Number of Offenders	Mean Active Sentence X	N	SD	Probation % N	1 day - 12 months	13-24 months	25-60 months	61-96 months	Over 96 months
<u>Misdemeanors/Felonies*</u>										
Disorderly Conduct	28	12.5	2	16.3	92.9 26	1	1	--	--	--
Harassment	27	1.8	12	1.0	55.6 15	12	--	--	--	--
Misc. Inv. Weapon II	76	4.3	37	9.7	51.3 39	36	--	1	--	--
Misc. Inv. Weapon III	30	3.6	11	6.9	63.3 19	10	1	--	--	--
Crim. Poss. Explosives	2	--	--	--	100.0 2	--	--	--	--	--
Promote Gambling II	1	--	--	--	100.0 1	--	--	--	--	--
Poss. Gambling Device	1	1.0	1	--	--	1	--	--	--	--
Liq. w/o License	12	4.7	10	5.1	16.7 2	9	1	--	--	--
Import of Liq.	11	6.6	7	8.0	36.4 4	6	1	--	--	--
Allow Drunk Premises	1	--	--	--	100.0 1	--	--	--	--	--
Minor Cons./Poss.	3	30.5	2	41.8	33.3 1	1	--	1	--	--
Bottle Club	1	1.0	1	--	--	1	--	--	--	--
Contempt of Court	1	--	--	--	100.0 1	--	--	--	--	--
Personal Crimes										
(Old Crim. Code)	1	215.0	1	--	--	--	--	--	--	1
Fail. to Obey Citation	1	--	--	--	100.0 1	--	--	--	--	--
Failure to Appear	23	12.2	15	11.1	34.8 8	11	2	2	--	--
Rules of the Road	2	--	--	--	100.0 2	--	--	--	--	--
Driver Must Be Licensed	7	1.0	2	--	71.4 5	2	--	--	--	--
DWLS	23	2.7	16	2.4	30.4 7	16	--	--	--	--
DWI	93	2.6	62	2.6	33.3 31	62	--	--	--	--
Reckless Driving	25	1.5	6	0.9	76.2 19	6	--	--	--	--
Fail to Render Aid	18	12.1	11	15.1	38.9 7	8	1	2	--	--
Fail Immed. Rept. Acc.	3	1.0	2	--	33.3 1	2	--	--	--	--
Disobey Peace Officer	3	6.5	2	7.8	33.3 1	2	--	--	--	--
Furnish Liq./Minor	4	1.5	2	0.7	50.0 2	2	--	--	--	--
Att. Escape III	1	--	--	--	100.0 1	--	--	--	--	--
Att. Prom. Contraband I	5	1.5	2	0.7	60.0 3	2	--	--	--	--

* Some of these offenses may be either a felony or a misdemeanor depending upon the facts of the individual case. Our data did not have sufficient detail to allow us to distinguish between felonies and misdemeanors.

TABLE C-8

CASE DISPOSITION TIME FOR FILED CASES*
(Mean Number of Days per Case)
1986-1987 Sample Database

	All Charges Dismissed	Guilty or Nolo Plea	Trial
Class of Most Serious Arrest Charge			
Murder I	896	136	249
Murder II, Drugs I, Kidnap	30	133	216
Sexual Assault I, Sexual Abuse of Minor I	86	100	149
Class A	78	91	218
Class B	111	100	135
Class C	131	94	137
Location of Case			
All Locations	131	96	168
Anchorage	142	90	173
Fairbanks	65	119	138
Southeast	88	75	171
Southcentral	246	133	290
Rural	119	90	124
Type of Case			
Murder-Kidnap	95	141	253
Violent	103	82	173
Property	144	96	138
Sexual	126	82	140
Drugs	144	130	144
Other	111	80	168

- * Disposition time is defined as time between complaint and sentencing or other date of final disposition as shown in the prosecutor's file.